(D) 83-1904

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACHE & CO. (LEBANON) S.A.L.,
a Lebanese corporation,

Petitioner,

—against—

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 21, 1984

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QUESTIONS PRESENTED

1. Are claims under the Commodity Exchange Act which are brought by citizens and residents of a foreign country against a foreign affiliate of a Delaware corporation, concerning alleged misconduct that occurred entirely outside the United States, properly within the subject matter jurisdiction of the federal courts solely because some of the commodity futures transactions at issue were executed on a United States exchange?

2. Did Congress intend to provide a private right of action under the Commodity Exchange Act to citizens and residents of foreign countries who complain of misconduct that occurred entirely outside of the United States?

LIST OF PARTIES TO THE APPEAL IN THE SEVENTH CIRCUIT

The names of all of the parties to the appeal in the Seventh Circuit are provided in the caption to this petiton. Sup. Ct. R. 21.1(b). A list of the parents, subsidiaries and affiliates of Bache Lebanon is annexed hereto as Appendix A pursuant to Rule 28.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

BACHE & CO. (LEBANON) S.A.L.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Bache & Co. (Lebanon) S.A.L. ("Bache Lebanon") respectfully requests that a writ of certiorari issue to review the interlocutory order of the United States Court of Appeals for the Seventh Circuit entered on March 30, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been officially reported, is annexed as Appendix B. The opinion of the United States District Court for the Northern District of Illinois (Getzendanner, J.), reported as *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 547 F. Supp. 309 (N.D. Ill. 1982), is annexed as Appendix C.

BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was premised on 28 U.S.C. §§ 1331, 1337 and 1350. After the District Court denied Bache Lebanon's motion for summary judgment or judgment on the pleadings, the Court of Appeals granted permission for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The order of the Court of Appeals, which affirmed the District Court's ruling, was entered on March 30, 1984.

STATUTE INVOLVED

Sections 4b and 4c of the Commodity Exchange Act, as amended in 1968 ("CEA"), 7 U.S.C. §§ 6b and 6c, are annexed as Appendix D. The Commodity Exchange Act of 1974 and the Futures Trading Act of 1982, which amended the CEA, are not applicable to this case because the disputes at issue arose before the passage of the amendments. In any event, the 1974 and 1982 amendments would not affect the questions posed by this petition.

STATEMENT OF THE CASE

Respondents Abdallah Tamari, Ludwig Tamari and Farah Tamari ("the Tamaris") are citizens and residents of Lebanon. In 1972, the Tamaris opened two commodity futures accounts with Bache & Co., Inc., a Delaware corporation ("Bache Delaware"), through Bache Lebanon, a Lebanese corporation with its sole office in Beirut. Bache Lebanon, a wholly-owned subsidiary of Bache Delaware, acted as Bache Delaware's agent in Lebanon in connection with the Tamaris' account and, as the Court of Appeals said, "all communications and meetings between Bache Lebanon and the Tamaris regarding the commodity futures contracts traded in the United States took place in Lebanon." (App. B at A-7)

A. Prior Litigation Between the Parties

Since 1975 the Tamaris have filed four lawsuits relating to the disputes at issue in this case. In addition, Bache Delaware and the Tamaris arbitrated their disputes before an arbitration panel of the Chicago Board of Trade.

The Tamaris filed this action in 1975 against both Bache Delaware and Bache Lebanon. The Tamaris alleged common law fraud, negligence, breach of fiduciary duty and violations of sections 4b and 4c of the CEA, 7 U.S.C. §§ 6b and 6c, claiming, *inter alia,* that Bache Delaware and Bache Lebanon had churned their accounts, made false representations to them and deceived them as to the status of their accounts.

In 1976, the District Court dismissed the complaint against Bache Delaware and ordered the Tamaris to proceed with an arbitration that had already been commenced before the Chicago Board of Trade and involved the same claims as those alleged in this action.[1] After evidentiary hearings, the arbitrators found in Bache Delaware's favor on its claim against the Tamaris and dismissed all of the Tamaris' counterclaims against Bache Delaware. The arbitration award was confirmed and a judgment entered on the award.[2] Thus, the only entity that conducted any relevant business in the United States with respect to the Tamaris' accounts was found to have acted properly and lawfully.

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1 The Tamaris' counterclaims in the arbitration were virtually identical to their claims in this action.

2 *Tamari* v. *Bache Halsey Stuart, Inc.*, No. 77 C 301 (N.D. Ill. 1979), *aff'd,* 619 F.2d 1196 (7th Cir.), *cert. denied,* 449 U.S. 873 (1980). The Tamaris filed two other lawsuits seeking to stay or overturn the arbitration proceedings on various grounds. The District Court dismissed both of these actions, and the Seventh Circuit affirmed both judgments. *Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, No. 76 C 21 (N.D. Ill. 1976), *aff'd,* 565 F.2d 1194 (7th Cir. 1977), *cert. denied,* 435 U.S. 905 (1978); *Tamari* v. *Conrad,* No. 76 C 2071 (N.D. Ill. 1976), *aff'd,* 552 F.2d 778 (7th Cir. 1977).

B. The Overwhelmingly Foreign Locus of This Case

The only claims remaining in this lawsuit are those asserted by the Tamaris against Bache Lebanon. Thus, the lawsuit has become one brought by foreign citizens against a foreign business, arising out of dealings in a foreign country. It is undisputed that all of the Tamaris' dealings with Bache Lebanon, including all of the alleged misconduct that underlies the Tamaris' complaint, took place in Lebanon, where Bache Lebanon conducted all of its activities. (App. B at A-4, 7; App. C at A-16-7)

When Bache Lebanon received orders from the Tamaris for commodity futures transactions, it transmitted them to Bache Delaware, which relayed the orders to the appropriate exchanges for execution in either England or the United States. (App. C at A-16, 25-6) Bache Delaware gave final acceptance to and processed the Tamaris' orders. (App. B at A-6) Bache Lebanon did not execute any of the Tamaris' orders; it is not registered as a futures commission merchant under the CEA[3] nor is it a member of any exchange in the United States, (App. C at A-16 n.2). Thus, any acts in the United States with respect to the Tamaris' accounts, including acceptance, processing and execution of orders, were done by Bache Delaware, a non-party, and have been found entirely proper by virtue of the arbitration before the Chicago Board of Trade.

C. The Rulings on Subject Matter Jurisdiction

In July 1981, Bache Lebanon moved for judgment on the pleadings or alternatively for summary judgment on the grounds, *inter alia,* that the District Court lacked subject matter jurisdiction over the plaintiffs' claims and that the Tamaris had no private right of action under the CEA. Bache Lebanon argued that Congress did not intend to provide for extraterritorial application of the CEA to a dispute between foreigners concerning alleged misconduct that occurred in a foreign country.

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3 *See* section 4d of the CEA, 7 U.S.C. § 6d.

The District Court, relying on the judicially created "effects" and "conduct" tests of extraterritorial jurisdiction,[4] denied Bache Lebanon's motion, but certified its order for appeal with respect to the issue of subject matter jurisdiction.

The Seventh Circuit granted permission for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and affirmed the District Court's ruling, expressly sanctioning the District Court's application of the "conduct" and "effects" tests and adopting the District Court's analysis under those tests. (App. B at A-12)

REASONS FOR GRANTING THE WRIT

The Seventh Circuit now joins the Second Circuit[5] in permitting the extraterritorial application of the CEA to disputes in which the sole nexus to the United States is execution of the customer's order on a domestic exchange. The Second and Seventh Circuits' interpretation of the CEA is contrary to analogous decisions of this Court and results in an impermissible and unwarranted extension of the CEA to disputes that have, at most, an utterly insignificant and incidental impact on United States interests.

The extraterritorial application of the CEA sanctioned by *Tamari* and *Psimenos* extends the law governing extraterritorial application of United States statutes far beyond its already

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4 The "effects" test, as set forth in *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir.), *aff'd as to jurisdiction and rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969), "focuses on whether conduct occurring outside the United States causes foreseeable and substantial effects within the United States." (App. B at A-7 n.6) The "conduct" test, set forth in *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972), "focuses on the significance of conduct within the United States to the accomplishment of illegal activities." (App. B at A-7 n.6)

5 *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983).

generous bounds,[6] and adversely affects every major American brokerage firm with foreign offices or affiliates abroad. Members of the New York Stock Exchange presently have 266 foreign offices or representatives in 31 foreign countries. 1 N.Y.S.E. Guide (CCH) at 671-680 (1984) (annexed as Appendix E). *Tamari* and *Psimenos* bring within the jurisdiction of the federal courts any dispute involving American securities or commodities futures occurring in any of those offices and in any of those countries, even if the dispute is entirely between foreigners and the subject matter of the dispute is alleged misconduct that occurred entirely outside the United States. There is no suggestion in the legislative history of the CEA that Congress intended that the federal courts should be burdened by cases of this sort.

(1)

Initially, the Seventh Circuit correctly held that legislative intent must be considered in determining the scope of jurisdiction under the CEA. (App. B at A-8) The Court relied on Second Circuit precedent for this position, citing the seminal *Bersch* case in which the Second Circuit held that

> "When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 985, *cert. denied*, 423 U.S. 1018 (1975).[7] *See also Fidenas AG* v. *Compagnie Internationale*, 606 F.2d at 10.

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6 Compare *Fidenas AG* v. *Compagnie Internationale Pour l'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5 (2d Cir. 1979); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

7 Although *Bersch* is a securities case, courts have applied principles developed in securities cases relating to subject matter jurisdiction to cases arising under the CEA. *See, e.g., Mormels* v. *Girofinance, S.A.*, 544 F. Supp. 815, 817 n.8 (S.D.N.Y. 1982).

The Court of Appeals could not find clear legislative intent to extend the CEA to foreign disputes. (App. B at A-10)

It is well settled that in the absence of clear legislative intent, it must be presumed that Congress did not intend to provide for extraterritorial application of a United States statute to disputes that are predominantly foreign. *See, e.g., Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-5 (1949); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932). But the Court below did not end its inquiry with a review of the CEA's legislative history. Instead, it incorrectly assumed that execution of commodity futures transactions on United States exchanges had sufficient impact on United States commerce to justify recourse to the conduct and effects tests, p. 5 n.4, *supra*, to determine whether extraterritorial application would be consistent with the purposes underlying the CEA. (App. B at A-10)

The Seventh Circuit's error in venturing beyond its inquiry into legislative intent was compounded by its extension of extraterritorial application of a United States statute beyond the already generous bounds established in recent cases. Moreover, the Court based this unwarranted extension solely upon a highly questionable presumption of generalized impact on the United States commodities markets. The Court merely stated its own view that "[t]he transmission of commodity futures orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges." (App. B at A-12) The Court also speculated that fraudulent activity in connection with commodity futures transactions would affect prices and trading volumes on futures exchanges and could undermine public confidence in the markets. *Id.*

In recent decisions under the federal securities laws, courts have been unwilling to extend application of those statutes to predominantly foreign disputes, even in cases in which there are far more contacts with the United States than exist here. In *Fidenas AG* v. *Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5 (2d Cir. 1979), foreign

plaintiffs agreed to raise money for defendant Honeywell Bull ("HBS"), a Swiss subsidiary of an American company, by the sale of promissory notes. Pursuant to an underwriting agreement, the plaintiff underwriters sold HBS notes to various customers, including a New York resident. It subsequently was learned that the HBS notes sold by plaintiffs had been forged and HBS refused to honor them.

The plaintiff underwriters sued HBS in federal court for violations of the antifraud provisions of the federal securities laws. Plaintiffs alleged that numerous acts related to the fraud had been committed by the defendants in the United States: the closing of the underwriting in New York City, the transmission of note proceeds through several United States banks, repeated communications between New York and Switzerland and purchases of HBS notes by American customers. The District Court dismissed the complaint and the Court of Appeals affirmed.

Relying on *Bersch*, the Second Circuit concluded that the core of the allegedly fraudulent activity occurred abroad and that the contacts between the alleged fraud and the United States, *including the sale here of the HBS notes*, were not sufficient to constitute fraudulent acts in this country. The Court summarized, "[f]raud there might have been, and plaintiffs may very well have been damaged by its perpetration. . . . [b]ut the dispute here presented is rightfully resolved in the courts of another land." *Fidenas AG* v. *Compagnie Internationale*, 606 F.2d at 10.

In *Mormels* v. *Girofinance S.A.*, 544 F. Supp. 815 (S.D.N.Y. 1982) (Weinfeld, J.), the court dismissed foreign securities claims on similar grounds. The plaintiffs in that case were two German nationals and a former Texan, all residing in Costa Rica, who sued to recover monies allegedly converted by their Costa Rican broker, defendant Girofinance. Also named as a defendant was E.F. Hutton & Co., Inc., a New York investment firm. The complaint alleged violations of the federal securities laws and the CEA.

The crux of the claim against Hutton was that it knew Girofinance was holding itself out as an agent of Hutton, thereby inducing plaintiffs to deposit funds with it for investment. American contacts with the alleged fraud included Girofinance's use of plaintiffs' funds to open an omnibus account with Hutton in the United States for trading, one plaintiff's placement of orders directly with a Hutton branch in the United States and the transmission of various telexes from Girofinance to that Hutton office.

The court found that the American contacts notwithstanding, all false representations were made in Costa Rica. Thus, under *Bersch* and *Fidenas,* no jurisdiction existed because the activity that occurred in the United States was not fraudulent. Judge Weinfeld stated that the American contacts with the transaction, including United States trading, "were 'relatively minor' and of a 'secondary' nature and [did] not detract from the fact that the core of the primary fraud was centered and committed in Costa Rica and not the United States." *Mormels* v. *Girofinance,* 544 F. Supp. at 818.

Similarly, in this case, the execution of the Tamaris' orders on the trading floor of an American exchange was an inconsequential fact in the context of their dispute with Bache Lebanon. Obviously, but for the mechanical act of execution on a United States exchange, the transactions that the Tamaris complain of might not have been consummated. But since the Tamaris do not claim that the mere execution of their transactions on the floor of the exchange was in any way fraudulent, the mechanical act of execution cannot properly be held to create a substantial justification for applying the CEA to the Tamaris' claims. Their claims of fraud and mishandling of their accounts, even if true, do not raise questions of domestic market integrity. They do not allege market or price manipulation. None of their claims, if true, would have any measurable impact on American investors. (*Cf.* App. B at A-12)[8] Thus, the

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8 The volume of the Tamaris' futures trading at Bache was *de minimus.* They claim to have traded 2800 futures contracts over a

(footnote continued on following page)

Tamaris' alleged injuries are unrelated to, and provide no evidence of, the effects presumed by the Seventh Circuit.

An assumption of unparticularized and speculative impact on the United States economy, or on American investors generally, is not sufficient to confer subject matter jurisdiction on the federal courts. *See Bersch* v. *Drexel Firestone,* 519 F.2d at 988. The Seventh Circuit presumed impact even though the record showed none and the Court's presumptions were not sanctioned by anything in the legislative history of the CEA. The Court's recourse to the "conduct" and "effects" tests was erroneous and its analysis of its own speculative assumptions under those tests, which were designed to measure *actual* impact on United States commerce, was incorrect.

(2)

As the Court of Appeals correctly concluded, neither the words of the CEA nor its legislative history suggest Congressional intent to provide for extraterritorial application of the Act to predominantly foreign disputes in which the alleged misconduct occurred outside the United States.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. 353 (1982), this Court held that a private party could maintain an action for damages caused by a violation of the CEA, although Congress had not expressly provided for such

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(footnote continued from preceding page)

thirteen month period in 1972 and 1973. Complaint ¶ 17; Tamaris' Answer to Arbitration Complaint ¶ 12(1). Many of their trades were executed on London commodities exchanges. *See* Tamaris' Answer to Arbitration Complaint ¶ 9. According to figures provided by the Futures Industry Association Inc., the volume of trading in 1972 and 1973 on United States exchanges was 18.3 million and 25.8 million contracts respectively. P. J. Kaufman, *Handbook of Futures Markets* (1984). Even if all of the Tamaris' 2800 contracts were executed on American exchanges, they comprised approximately one one-hundredth of one percent of the annual trading volume during the years relevant to this case.

actions.[9] The *Merrill Lynch* case involved an alleged massive conspiracy to manipulate the potato futures market on the New York Mercantile Exchange. The alleged fraud and manipulation took place in the United States and, assuming the plaintiffs' allegations were true, had a demonstrable impact on domestic investors and the integrity of the domestic potato market. In *Merrill Lynch,* the execution of customers' orders for transactions in commodity futures and physical commodities, and the effect of those executions on prices, were not secondary or minor aspects of the alleged misconduct but went to the heart of the case. On those facts, the implication of a private right of action advanced Congress' purpose in promulgating the CEA to foster orderly and fair markets.

This case is entirely different. Respondents do not allege a conspiracy to manipulate prices on American commodity exchanges. Their trades comprised a minuscule percentage of the total futures contracts traded during the period they maintained their accounts at Bache Lebanon. *See* p. 9 n.8, *supra.* Any alleged misrepresentations or misconduct by Bache Lebanon in Lebanon with respect to the Tamaris' accounts did not and could not undermine the fairness of the United States commodities markets, nor did the mere execution of the Tamaris' orders lie anywhere near the heart of Bache Lebanon's alleged misconduct. To imply a private right of action under the CEA in favor of the Tamaris, or to extend the express right of action in the 1982 Futures Trading Act to disputes with an overwhelmingly foreign locus, would burden the federal courts without any attendant benefit to American investors or the domestic markets.

In an analogous case, *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506 (1974), this Court held that an arbitration agreement involving extranational transactions was enforceable even though the claims to be asserted in arbitration arose under the

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9 A private right of action was expressly provided for in the 1982 amendments to the CEA. Section 22, Futures Trading Act of 1982, 7 U.S.C. § 25.

Securities Act of 1933. Arbitration agreements involving *domestic* transactions are unenforceable with respect to claims arising under the Act. *Wilko* v. *Swan,* 346 U.S. 427 (1953).

But as the Court said in *Scherk,* in distinguishing domestic and extranational transactions,

> "The invalidation of such an agreement in the case before us would . . . reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.' " *Id.* at 519, quoting *The Breman* v. *Zapata Off-Shore Co.,* 407 U.S. 1, 9 (1972).

If foreign citizens trading commodity futures through foreign entities are to be afforded the full protections of the CEA, it should be accomplished by a program of legislation and related treaties under which American citizens would receive similar protections under the laws of foreign nations. The development and coordination of a comprehensive scheme of redress for disputes involving the commodities markets are tasks peculiarly within the legislative province that should await further guidance from Congress. Judicial expansion of CEA jurisdiction by any Court of Appeals in circumstances such as those presented here is plainly improper and should be halted.

(3)

The decision below, together with the Second Circuit's decision in *Psimenos* and the growing internationalization of trading markets,[10] presage a steady flow into the federal courts of disappointed foreign speculators in commodity futures,

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10 The CFTC itself "recognizes the international character of the futures markets which it regulates." *Proposed Duties of Futures Commission Merchants Toward Accounts of Foreign Brokers and Traders,* [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 21,028 (CFTC May 14, 1980) at 24,044.

financial futures, options and securities whose essentially foreign claims have as their sole nexus to the United States a mechanical execution on the floor of a United States exchange.[11] The judicial burden will be entirely federal, because the jurisdiction over CEA claims has been exclusively federal since 1983. Section 22(c), Futures Trading Act of 1982, 7 U.S.C. § 25(c).

This Court observed in a *forum non conveniens* case that the American courts have become "extremely attractive to foreign plaintiffs." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 (1981). In rejecting a court of appeals ruling that restricted the application of the *forum non conveniens* doctrine, the Court recognized that under such a ruling, "[t]he flow of litigation into the United States would increase and further congest already crowded courts." *Id.*

The Commodity Futures Trading Commission ("CFTC"), which is charged with the administration of the CEA and regulation of the commodities markets, has announced that it will shed the burden created by the decisions below and in *Psimenos* by dismissing reparations complaints, even if there are sufficient domestic contacts to satisfy the "conduct" or "effects" tests, if adjudication of a reparations complaint would cause substantial inconvenience to the respondent or to the Commission. *CFTC Statement of Policy Concerning the Exercise of Commission Jurisdiction Over Reparations Claims That Involve Extraterritorial Activities of Respondents*, 49 Fed. Reg. 14721 (April 13, 1984).[12]

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11 One such case, *Cresswell* v. *Prudential-Bache Securities Inc.*, 580 F. Supp. 55 (S.D.N.Y. 1984), involving 85 exclusively foreign-based plaintiffs complaining of alleged misrepresentations made to them by foreign-based brokerage firm employees, is now winding its way toward a jury trial of at least three month's duration. By the time of trial there will have been more than 100 depositions.

12 The CFTC has likewise shed a comparable burden by exempting from registration under the CEA account executives whose business is confined to foreign customers:

(footnote continued on following page)

In thus applying a *forum non conveniens* analysis, the CFTC has exercised an option not available to the federal district courts. If, as the Court of Appeals below and the Second Circuit have held, the CEA has extraterritorial application, the district courts have exclusive jurisdiction over foreign claims unless the plaintiff elects a reparation proceeding before the CFTC. Unlike the CFTC in reparations cases, a federal district court may not dismiss on the ground of *forum non conveniens* a federal claim over which it has exclusive jurisdiction. *See* 13 C. Wright & A. Miller, *Federal Practice and Procedure* § 3564 (1975) at 429.

This Court should act now to settle the questions posed by petitioner rather than await the inevitable conflict among the courts of appeals. The questions posed here have critical importance. By the time another court of appeals comes to a different conclusion in another case, the federal courts will have been needlessly burdened and litigants will have needlessly spent millions of dollars in litigation expense because of the inducement to litigation erroneously offered by the Second and Seventh Circuits.

So long as *Bersch* was the seminal decision on the extraterritorial application of federal statutes, there was little need for this Court to speak on the subject. Judge Friendly's decision in *Bersch* was manifestly sound and seemed to be leading the federal courts to results consistent with Congressional intent. The decisions in the present case and in *Psimenos*, however,

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(footnote continued from preceding page)

> "The Commission believes that, given this agency's limited resources, it is appropriate at this time to focus its customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such areas." *CFTC Revision of Registration Regulations; Proposed Rules*, 45 Fed. Reg. 18356 at 18360 (March 20, 1980).

represent an unwarranted and dangerous erosion of this sound federal judicial benchmark and soon will lead to a burden of litigation in the federal courts involving foreign claims and claimants never envisioned by Congress. We respectfully submit that now is the time for this Court to act.

CONCLUSION

For the foregoing reasons, Bache Lebanon respectfully requests that the Court grant a writ of certiorari to review the decision of the Seventh Circuit.

May 21, 1984

Respectfully submitted,

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APPENDIX A

Appendix A

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Respondent Bache & Co. (Lebanon) S.A.L. ("Bache Lebanon") is a wholly-owned subsidiary of Prudential-Bache Securities Inc. (formerly Bache & Co., Inc., designated as "Bache Delaware" in the foregoing petition). The following are additional parent companies and affiliates of Bache Lebanon.

The Prudential Insurance Company of America
PRUCO, Inc.
Prudential Capital and Investment Services Inc.
Bache Group Inc.
Prudential-Bache Leasing Inc.
Prudential-Bache Commodity Management Company, Inc.
Bache Securities Inc.
Bache Commodities Ltd.
Bache Guinness Mahon Futures Limited
Prudential-Bache Metal Co. Inc.
Bache Precious Metals, Inc.
Prudential-Bache Energy Corp.
Prudential-Bache Latin America Inc.
Prudential-Bache Southern Europe Inc.
Prudential-Bache Properties, Inc.
Halsey Stuart Corporate Services Limited
Bache Halsey Stuart Shields Holding Corporation
Prudential-Bache Agriculture Inc.
Bache Insurance Agency of Louisiana, Inc.
Bache Insurance Agency of Nevada, Inc.
Prudential-Bache Energy Production Inc.
P-B Finance Ltd.
Prudential-Bache Venture Capital Inc.
Bache Insurance Agency of Arkansas, Inc.
R & D Funding Corp.

Appendix A

Bache Securities Asia Pacific Ltd.
Bache Securities Espana S.A.
Bache Securities (France) S.A.
Bache Insurance Agency, Incorporated
Bache Insurance of Arizona, Inc.
Bache Insurance of Kentucky, Inc.
Bache Securities (Hong Kong) Limited
Bache Securities (Greece) S.A.
Bache Securities (Monaco) Inc.
Prudential-Bache (Pan America) Inc.
Prudential-Bache Puerto Rico Inc.
Bache Securities (Japan) Ltd.
Bache Securities (South America) S.A.
Bache Securities (Argentina) S.A.
Bache Securities (Belgium) Inc.
Bache Securities (Germany) Inc.
Bache Securities (Holland) Inc.
Bache Securities (Switzerland) Inc.
Bache Securities (U.K.) Inc.
Bachfurn Corporation
Shields Model Roland Company (London)
Prudential-Bache Real Estate, Inc.

APPENDIX B

Appendix B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 83-2452

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,

Plaintiffs-Appellees,

v.

BACHE & CO. (LEBANON) S.A.L., a Lebanese corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 4189—Susan Getzendanner, *Judge.*

ARGUED JANUARY 18, 1984—DECIDED MARCH 30, 1984

Before BAUER and FLAUM, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* The plaintiffs-appellees ("the Tamaris"), citizens of Lebanon, brought this suit under the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 6b and 6c, for damages resulting from alleged fraud and mismanage-

ment of their commodity futures trading accounts. The defendant-appellant, Bache & Co. (Lebanon) S.A.L. ("Bache Lebanon"), is a Lebanese corporation wholly owned by Bache & Co., Inc., a Delaware corporation ("Bache Delaware"). The issue presented in this interlocutory appeal is whether the district court has subject matter jurisdiction under the CEA over a dispute between nonresident aliens when the trading of commodity futures contracts giving rise to the suit took place on United States exchanges but the contacts between the parties occurred in Lebanon.[1] The district court held that it had subject matter jurisdiction in ruling on Bache Lebanon's motion for judgment on the pleadings, or, in the alternative, for summary judgment. The court later denied Bache Lebanon's motion to reconsider its ruling, but certified for appeal those parts of its order dealing with its subject matter jurisdiction over the case.[2] This court granted permission to

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1 The plaintiffs also stated a claim of common law fraud, asserting jurisdiction under 28 U.S.C. § 1350 and principles of pendent jurisdiction. Both parties appear to assume that this claim would not survive if jurisdiction is lacking under the CEA. We note that 28 U.S.C. § 1350 has been narrowly construed and would not supply a basis for federal jurisdiction over the common law claim. *See ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Without a federal claim that could survive a motion to dismiss, the plaintiffs also could not rely upon principles of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

2 In its original motion, Bache Lebanon had asserted that it was entitled to judgment for three reasons: (1) the district court lacked subject matter jurisdiction; (2) the claims against it were collaterally estopped by an arbitrator's decision in favor of its parent, Bache Delaware; and (3) the Tamaris had no implied right of action under the Commodity Exchange Act. The district court ruled against Bache Lebanon on all three issues. *Tamari v. Bache & Co. (Lebanon) S.A. L.*, 547 F. Supp. 309 (N.D. Ill. 1982). Bache Lebanon now seeks reversal of the district court only on the ground that subject matter jurisdiction is lacking over the dispute. Although Bache Lebanon also has discussed the issues of res judicata and collateral estoppel in

take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on July 20, 1983. For the reasons stated below, we affirm the district court's denial of Bache Lebanon's motion.

I

A. Background of this Suit

When the Tamaris filed this action in December 1975, both Bache Lebanon and its parent, Bache Delaware, were named as defendants. The Tamaris alleged that Bache Lebanon solicited them to open two commodity futures trading accounts, which they did early in 1972. The Tamaris further alleged that in soliciting and trading for their accounts, Bache Lebanon, Bache Delaware, or both, violated the CEA, causing losses to the Tamaris' accounts of more than two million dollars.[3] The alleged violations include excessive trading and churning of the accounts; making false representations, false reports and false statements to the Tamaris; and deceiving the Tamaris as to the true condition of the accounts.

The district court dismissed the action against Bache Delaware on May 19, 1976,[4] because an arbitration proceeding

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support of its position on subject matter jurisdiction, we find it unnecessary to consider these issues in reaching our decision on subject matter jurisdiction. Nor do we rule on whether we have jurisdiction to decide them given the district court's limited certification order. *See Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).

3 The parties disagree on the extent of Bache Lebanon's involvement in the solicitation and management of the Tamaris' accounts and on the nature of the agency relationship between Bache Lebanon and Bache Delaware.

4 This court dismissed the Tamaris' appeal of the district court's order dismissing the action against Bache Delaware without prejudice to any further appeal from an appealable order in this case. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, No. 76-1729 (7th Cir. Sept. 23, 1976) (unreported order).

between the Tamaris and Bache Delaware was pending at the time suit was filed. The proceeding was before the Chicago Board of Trade pursuant to an arbitration agreement between the parties. Bache Delaware sought an award of $376,366.96 against the Tamaris for the balance owed in the Tamaris' trading accounts; the Tamaris sought $2,150,000 in damages based on a counterclaim similar to the claims of this lawsuit. Bache Delaware ultimately prevailed in the arbitration proceeding,[5] and successfully defended against the Tamaris' later suit seeking to vacate the arbitration award. *See Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2d 1196 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980). The only action remaining, therefore, is that against Bache Lebanon.

B. Motion for Judgment on the Pleadings

In light of the arbitation decision, Bache Lebanon filed its motion for judgment on the pleadings or summary judgment. The undisputed facts relevant to the question of subject matter jurisdiction raised by the motion can be briefly stated. The plaintiffs are citizens of Lebanon and reside outside the United States. Bache Lebanon, a wholly-owned subsidiary and agent of Bache Delaware, is a Lebanese corporation and has its sole office in Beirut, Lebanon. In the course of trading for the Tamaris' accounts, Bache Lebanon received futures orders from the Tamaris in Lebanon and transmitted them by wire to Bache Delaware for execution on the Chicago Board of Trade and the Chicago Mercantile Exchange. Bache Delaware, a member of both exchanges, then executed the contracts. Although there were daily conversations between the Tamaris,

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5 The Tamaris filed two additional lawsuits seeking to stay the arbitration on various grounds. The district court dismissed both suits, and those dismissals were affirmed by this court. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, No. 76 C 21 (N.D. Ill. May 19, 1976), *aff'd*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978); *Tamari v. Conrad*, No. 76 C 2071 (N.D. Ill. Nov. 15, 1976), *aff'd*, 552 F.2d 778 (7th Cir. 1977).

Bache Lebanon, and Bache Delaware, all communications and meetings between Bache Lebanon and the Tamaris regarding the commodity futures contracts traded in the United States took place in Lebanon.

The district court denied Bache Lebanon's motion, holding that subject matter jurisdiction exists over a cause of action arising from trading on United States exchanges even though the parties are nonresident aliens and the contacts between them occurred in a foreign country. The court reached its decision by applying two doctrines used to analyze jurisdictional questions that arise from transnational disputes—the effects test and the conduct test.[6] Under both tests, the court concluded that jurisdiction exists over this case.

Bache Lebanon now challenges this determination. It first contends that the district court failed to consider whether Congress intended the CEA to apply to nonresident aliens when the alleged illegal acts occurred in a foreign country, and then argues that subject matter jurisdiction is lacking because Congress did not intend such application. Bache Lebanon also contends that subject matter jurisdiction does not exist under either the conduct test or the effects test.

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6 The effects test derives from section 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965), and focuses on whether conduct occurring outside the United States causes foreseeable and substantial effects within the United States. *See Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969). The conduct test derives from section 17 of the Restatement and focuses on the significance of conduct within the United States to the accomplishment of illegal activities. *See Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975).

II

We agree with Bache Lebanon's contention that legislative intent must be considered. *See, e.g., Psimenos v. E. F. Hutton & Co.*, 722 F.2d 1041, 1044-45 (2d Cir. 1983); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975). Subject matter jurisdiction exists over this dispute only if the antifraud provisions of the Commodity Exchange Act were intended to apply to foreign brokers or agents of commodity exchange members whenever they facilitate futures trading on United States exchanges.[7] Looking to the language of the statute and its legislative history, we find no indication, however, that Congress intended to prohibit fraudulent dealings connected with futures trading on domestic exchanges only if the futures transactions originate in the United States.

One of Congress's fundamental purposes in enacting the CEA was to ensure fair practice and honest dealings on commodity exchanges, for the protection of the market itself as well as those who could be injured by unreasonable fluctuations in commodity prices. S. Rep. No. 93-1131, 93d Cong., 2d Sess. 14, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5856. *See also* 7 U.S.C. § 5. To effectuate this purpose, the Act creates a comprehensive regulatory scheme premised on control over domestic stock exchanges and the trading of futures contracts on those exchanges.[8] The specific provisions of the

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7 Jurisdiction over civil actions arising under the CEA is conferred by 28 U.S.C. §§ 1331 and 1337 rather than by any specific provision in the CEA.

8 Congress has authorized the regulation of commodity futures exchanges for over seventy years. In 1922, Congress enacted the Grain Futures Act, 42 Stat. 998, which prohibited any person from dealing in futures contracts off a designated contract market. It further provided that the Secretary of Agriculture could designate a board of trade as a contract market only if the board prevented its members from disseminating misleading market information and

CEA upon which this suit is based broadly proscribe fraudulent commodity futures transactions. Under 7 U.S.C. § 6b, any member of a contract market, or its agents, is prohibited from defrauding any person in connection with the making of a futures contract on any contract market.[9] Under 7 U.S.C. § 6c, it is unlawful for any person to enter into or confirm the execution of a meretricious commodity futures transaction.

We recognize that the Act does not expressly state that the term "agent" includes, or excludes, agents doing business in foreign countries, or that "person" includes, or excludes, nonresident aliens. *See* 7 U.S.C. § 2. Nor does the legislative history provide any guidance on whether these provisions should be applied to all agents of commodity exchange members, regardless of their location. In support of their respective positions, the parties and the Commodity Futures Trading Commission, as *amicus curiae*, have referred to congressional reports on the 1974 and 1982 amendments to the CEA, and to subsequent regulations promulgated by the Commission.[10]

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prevented price manipulation. Though the regulatory scheme has become more expansive and complex, these basic provisions are still included in the Commodity Exchange Act. *See* 7 U.S.C. §§ 6 and 7.

9 The Commodity Futures Trading Commission designates a board of trade as a "contract market" when it complies with and carries out certain conditions and requirements. 7 U.S.C. § 7.

10 *See* H.R. No. 93-975, 93d Cong., 2d Sess. 61-64 (1974) (discussing expansion of the CEA's coverages to include world commodities); 17 C.F.R. §§ 17.00 and 21.02 (1983) (requiring foreign brokers and foreign traders to comply with Commission reporting provisions and "special calls" for information on their market positions); 17 C.F.R. § 30.02 (1983) (proscribing fraud in connection with futures transactions other than on domestic contract markets); 45 Fed. Reg. 18360 (March 20, 1980) and 17 C.F.R. § 3.12 (1983) (rescinding registration requirement for foreign associated persons of domestic firms). *See also* H.R. Rep. No. 97-565, 97th Cong., 2d Sess. 68, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3917 (discussion relating to 17 C.F.R. §§ 17.00 and 21.02).

Bache Lebanon attaches particular significance to the Commission's decision to exclude foreign associated persons of domestic firms from registration requirements. However, we do not regard this decision as an indication of congressional intent on the jurisdictional limits of the antifraud provisions, especially when the Commission has taken the position that the CEA confers subject matter jurisdiction over this dispute. Likewise, the other references illustrate specific legislative and administrative responses to increased international trading in commodity futures, but do not address the intended jurisdictional scope of the antifraud provisions of the Act.

Finding nothing in the Act or its legislative history to indicate that Congress did not intend the CEA to apply to foreign agents, but recognizing there also is no direct evidence that Congress intended such application, we believe it is appropriate to rely on the "conduct" and "effects" tests in discerning whether subject matter jurisdiction exists over this dispute.[11]

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11 As a matter of foreign relations law, the conduct and effects principles indicate whether the United States has jurisdiction to prescribe a rule that attaches legal consequences to conduct occurring in the United States, or to conduct occurring outside the United States that causes effects within the United States. *See* Restatement (Second) of Foreign Relations Law of the United States §§ 17 and 18 (1965). Were Congress to enact a rule beyond the scope of these principles, the statute could be challenged as violating the due process clause on the ground that Congress lacked the power to prescribe the rule. *See Blackmer v. United States*, 284 U.S. 421, 436 (1931); *Leasco, supra*, 468 F.2d at 1334.

When the question instead is whether Congress intended a statute to have extraterritorial application, the analysis of legislative intent becomes intertwined with these principles of foreign relations law. If extraterritorial application would have no impact on domestic conditions, it is presumed that Congress did not intend the statute to apply outside the territory, unless a contrary intent appears. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Reliance on this presumption is misplaced, however, when the conduct under scrutiny has not occurred wholly outside the United States, or when conduct outside the United States could otherwise affect domestic conditions. *Leasco,*

Both tests were developed in cases brought under the antifraud provisions of the federal securities laws and have recently been applied in similar cases arising under the Commodity Exchange Act. *See, e.g., Psimenos, supra*, 722 F.2d at 1044-48 (CEA); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. SEC*, 431 U.S. 938 (1977); *Bersch, supra*, 519 F.2d 985-93; *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015-19 (2d Cir. 1975); *Leasco, supra*, 468 F.2d at 1333-39; *Schoenbaum, supra*, 405 F.2d at 206-08; *Alemano v. ACLI International, Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,898 at 27,894 (S.D.N.Y. Nov. 2, 1983) (CEA); *Mormels v. Girofinance, S.A.*, 544 F. Supp. 815 (S.D.N.Y. 1982) (CEA). The conduct test focuses on the foreigner's conduct within the United States as it relates to the alleged scheme to defraud. *See, e.g., Grunenthal, supra*, 712 F.2d at 423-26; *Kasser, supra*, 548 F.2d at 112-16; *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 523-28 (8th Cir. 1973); *Bersch, supra*, 519 F.2d at 987. When the conduct occurring in the United States is material to the successful completion of the alleged scheme, jurisdiction is asserted based on the theory that Congress would not have intended the United States to be used as a base for effectuating the fraudulent conduct of foreign companies. *See Psimenos, supra*, 722 F.2d at 1046; *Kasser, supra*, 548 F.2d at 116. *See also Vencap, supra*, 519 F.2d at 1017. Under the effects test, courts have looked to whether conduct occurring in foreign countries had caused foreseeable

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supra, 468 F.2d at 1334; *Schoenbaum, supra*, 405 F.2d at 206. In these cases, courts have looked to the nature of the conduct or effects in the United States to determine whether extraterritorial application would be consistent with the purposes underlying the statute. *See, e.g., Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir. 1983); *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied sub nom. Churchill Forest Industries (Manitoba), Ltd. v. SEC*, 431 U.S. 938 (1977); *Bersch, supra*, 519 F.2d at 985-93; *Schoenbaum, supra*, 405 F.2d at 206-08.

and substantial harm to interests in the United States. *See, e.g., Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 416-17 (8th Cir. 1979); *Vencap, supra*, 519 F.2d at 1015-17; *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-09 (2d Cir.), *rev'd on other grounds*, 405 F.2d 125 (2d Cir. 1968) (en banc), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969). The underlying theory is that Congress would have wished domestic markets and domestic investors to be protected from improper foreign transactions. *See Vencap, supra*, 519 F.2d at 1016-17; *Schoenbaum, supra*, 405 F.2d at 206. *See also Kasser, supra*, 548 F.2d at 116.

The district court's analysis under the conduct and effects tests was derived from these analogous cases. We find that the district court correctly applied the tests to the facts of this case and adopt its analysis under both tests.[12] *See Tamari v. Bache & Co. (Lebanon) S.A.L.*, 547 F. Supp. 309 (N.D. Ill. 1982). The transmission of commodity futures orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges. Further, when transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction. If transactions are the result of fraudulent representations, unauthorized trading or mismanagement of trading accounts, prices and trading volumes in the domestic marketplace will be artificially influenced, and public confidence in the markets could be undermined.

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12 We also note that the Second Circuit in *Psimenos, supra*, expressly approved the district court's conclusion that the transmission of a customer's orders from abroad to the United States constitutes sufficient conduct within the United States to support jurisdiction under the CEA.

Appendix B

By asserting jurisdiction under the conduct and effects rationales, the purposes of the Act are advanced. Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on domestic exchanges, the domestic commodity futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.

We therefore affirm the district court's order and opinion finding subject matter jurisdiction over this case.

APPENDIX C

Appendix C

UNITED STATES DISTRICT COURT
N. D. Illinois, E. D.

No. 75 C 4189

May 25, 1982

Abdallah W. TAMARI, et al.,

Plaintiffs,

v.

BACHE & CO. (LEBANON) S.A.L.,

Defendant.

Robert P. Howington, Jr., Howington, Elworth, Osswald & Hough, Chicago, Ill., for plaintiffs.

N.A. Giambalvo, James W. Collins, Lawrence M. Gavin, Boodell, Sears, Sugrue, Giambalvo & Crowley, Chicago, Ill., for defendant.

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge.

This matter is before the court on the motion of defendant Bache & Co. (Lebanon) S.A.L. ("Bache Lebanon") for judgment on the pleadings or, in the alternative, for summary judgment. Defendant asserts three grounds for its motion: lack

of subject matter jurisdiction; collateral estoppel; and no right of action under the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (the CEA) and associated rules and regulations. For the reasons that follow, the motion is denied, except as to the alleged violations of the exchange rules.

Subject Matter Jurisdiction

Plaintiffs Abdallah Tamari, Ludwig Tamari and Farah Tamari (the Tamaris) are Lebanese citizens and residents of that country. Defendant Bache Lebanon is a wholly-owned subsidiary of Bache & Co., Inc., a Delaware corporation ("Bache Delaware")[1], and it is a Lebanese corporation having its sole office in Beirut, Lebanon. The Tamaris allege that Bache Lebanon solicited commodity futures orders (apparently for silver, coffee and pork bellies, among other commodities) from them in Lebanon and then transmitted such orders by wire from its Beirut office to Bache Delaware's Chicago offices for execution on the Chicago Board of Trade (the CBOT) and the Chicago Mercantile Exchange (the CME).[2] They further allege that Bache Lebanon made misrepresentations regarding its expertise, gave false advice on market conditions, mismanaged their accounts, and breached its fiduciary duty. Their complaint has two counts, the first under the CEA, and the second for common-law fraud.

The jurisdictional issue is whether this court has subject matter jurisdiction over a cause of action arising from trading on American commodities exchanges when the parties to the suit are nonresident aliens and the contacts between them

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1 Bache Delaware was formerly a defendant in this litigation, but on May 19, 1976, Judge Grady, to whom this case was previously assigned, dismissed Bache Delaware. The Tamaris then arbitrated their claims against Bache Delaware and Bache Delaware prevailed in the arbitration proceedings.

2 Bache Lebanon is not a member of either exchange and thus could not execute the orders itself.

occurred outside the United States. The court concludes that it does have jurisdiction of this dispute.

The CEA has been held to have extraterritorial application in some circumstances, *Commodity Futures Trading Commission v. Muller*, 570 F.2d 1296, 1299 (5th Cir. 1978). Both parties, in arguing for and against the applicability of the CEA to the circumstances in this case, have primarily relied on the case law in analogous securities law cases. There is a substantial body of such case law defining the transnational scope of the Securities Act of 1933 and the Securities Exchange Act of 1934. See generally the cases and articles listed in *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979).[3]

In these cases, courts have developed two related doctrines for analyzing transnational problems, the effects test and the conduct test.[4] While some courts have indicated that both tests must be satisfied in order to sustain subject matter jurisdiction, the weight of authority holds that meeting either test establishes jurisdiction. *Continental Grain*, *supra*, 592 F.2d at 417 (8th Cir. 1979) (jurisdiction may be established by meeting either test); *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3d Cir. 1976) (conduct alone sufficient from a jurisdictional standpoint); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (same). This court need not resolve the issue, however, as under each test jurisdiction exists here.

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3 For additional analyses of the important case law in this area, see *Grunenthal GmbH v. Hotz*, 511 F.Supp. 582, 585-87 (C.D.Cal.1981); and *Recaman v. Barish*, 408 F.Supp. 1189, 1194-1202 (E.D.Pa.1975).

4 "Of course, the courts may in reality by [sic] using a much more flexible, and more traditional, approach; that is, the courts may, in each particular fact situation, be balancing the competing interests presented. . . . *cf.* Comment, *Jurisdiction in Transnational Securities Fraud Cases—SEC v. Kasser, supra*, note 4, 7 Den.J. Int'l L. & Pol'y at 286 n.46 (suggesting "test" is too simplistic a term)." *Continental Grain, supra*, 592 F.2d at 416 n.11.

Appendix C

The Effects Test

Under the effects test, courts sustain jurisdiction over conduct occurring in foreign countries when that conduct causes forseeable and substantial harm to interests within the United States, that is, when there is a substantial impact on domestic investors or on the domestic market. The doctrinal basis for this test derives from the Restatement (Second) of Foreign Relations Law of the United States § 18.[5] The first court to formulate and apply the effects test was the Second Circuit in *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *aff'd as to jurisdiction and rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom., Manley v. Schoenbaum*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969).

In *Schoenbaum*, an American shareholder in a Canadian corporation brought a derivative suit alleging fraud in violation of the 1934 Securities Exchange Act. The challenged transaction occurred in Canada, but it involved Canadian stock registered on the American Stock Exchange. The court held that the securities laws applied extraterritorially in that case "in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." 405 F.2d at 206.

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5 § 18. Jurisdiction to Prescribe With Respect to Effect Within Territory.

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Appendix C

The effects test enunciated in *Schoenbaum* was later limited by two cases from the Second Circuit decided on the same day, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied sub nom., Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975) and *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975). In *Bersch*, a plaintiff class consisting of thousands of shareholders, most of whom were foreign, had purchased stock in an international corporation organized under the laws of Canada. The named plaintiff, an American, brought an action against various American and foreign underwriters and an American accounting firm. The challenged public offering had been deliberately structured to avoid sales in America, but despite this some sales had been made to Americans, both within the United States and abroad.

One of the grounds for jurisdiction asserted in *Bersch* was the adverse general effect the collapse of the international corporation had on the American stock market, even though its securities were not traded on American exchanges. To support this assertion, plaintiffs submitted an affidavit from an economics professor. The *Bersch* court rejected this argument, stating:

> [W]e do not doubt that the collapse of IOS after the offering had an unfortunate financial effect in the United States. Nevertheless we conclude that the generalized effects described by Professor Mendelson would not be sufficient to confer subject matter jurisdiction over a damage suit by a foreigner under the anti-fraud provisions of the securities laws.

519 F.2d at 988. See also *Recaman v. Barish*, 408 F.Supp. 1189, 1199 n.11 (E.D.Pa. 1975) (study showing general adverse impact on economy in case where securities were not traded on domestic exchanges held to be insufficient under effects test).

In *SEC v. Kasser*, 548 F.2d 109, 113 (3d Cir.) *cert. denied sub nom. Churchill Forest Industries (Manitoba) Ltd. v. SEC*, 431 U.S. 938, 97 S.Ct. 2649, 53 L.Ed.2d 255 (1977), the Third Circuit found the effects test to be inapplicable in a case where the securities involved were not traded on American exchanges. The Court reasoned:

Appendix C

> Frequently, trading on an exchange has helped to undergrid findings of jurisdiction in other transnational cases. Where a stock exchange is involved, courts have found sufficient impact in the United States to sustain jurisdiction.

The Eighth Circuit in *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 417 n.12 (8th Cir. 1979), used a similar rationale to find the effects test unavailing where the plaintiff was a foreign corporation, where the securities involved were those of a foreign corporation and were never registered or listed on American exchanges, and where the alleged harm to the plaintiff's American corporate parent was indirect. In distinction to *Kasser* and *Continental Grain* stands the case of *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), in which the court upheld jurisdiction partially on the basis that the challenged transactions involved American securities.

Bache Lebanon argues that the facts in the present case do not satisfy the effects test for jurisdiction. It contends that a "personal dispute between private foreign parties cannot have any impact whatever upon United States investors or upon the United States commodities market." (Def. Memo in Support at 12.) Concededly, both the plaintiffs and the defendant in this case are Lebanese and the allegedly fraudulent representations all occurred in Lebanon. The commodities involved, however, were traded on American exchanges.

Relying on this fact, the Tamaris counter that fraudulent transactions on American commodities exchanges have a detrimental effect on the trading on such exchanges and they have submitted an affidavit by an economics professor to that effect. Bache Lebanon attacks the sufficiency of this affidavit on the grounds discussed in the *Bersch* case, that it only describes a theoretical and generalized harm and that this type of harm cannot confer subject matter jurisdiction. Bache Lebanon continues: "Moreover, given the limited volume of Tamaris' trades in relation to total volume, it is difficult to perceive how any impact could have been felt." (Def. Reply Memo at 8.)

The flaw in Bache Lebanon's arguments is that the transactions at issue here directly involved domestic futures exchanges. The cases Bache Lebanon cites, in which courts found no jurisdiction, all involved foreign securities that were not traded on American exchanges: *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Investment Properties International, Ltd. v. IOS, Ltd.*, [1970-71] Fed.Sec.L.Rep. (CCH) ¶ 93,011 at 90,736 (S.D.N.Y.), *aff'd without opinion* (2d Cir. 1971); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 7 (2d Cir. 1979); *Finch v. Marathon Securities Corp.*, 316 F.Supp. 1345, 1347 (S.D.N.Y. 1970) ("It should be noted that [the securities involved] have never been registered in this country—nor have they ever been listed on any of our national securities exchanges or traded on our over-the-counter market.").[6]

Similarly, while Bache Lebanon correctly characterizes the affidavit of the Tamaris' expert as theoretical and generalized, the affidavit was not necessary in the first instance to establish an impact on the American futures market. In *Bersch*, the case

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6 The one case cited by Bache Lebanon that involved American securities is *Manus v. The Bank of Bermuda*, [1971-72] Fed.Sec.L.Rep. (CCH) ¶ 93,299 (S.D.N.Y. 1971). There Canadian plaintiffs sued a Bermuda defendant for a transaction that occurred in London involving the unregistered stock of a New York corporation. The court stated:

> In addition to the foregoing which compels dismissal of this complaint for failure to state a claim upon which relief can be granted, subject matter jurisdiction appears to be lacking. The parties are aliens and the principal transaction of which plaintiffs complain took place in London. The plaintiffs do not claim . . . that the transaction was detrimental to the interests of domestic investors or of the domestic securities market. . . . But the question of jurisdiction need not be reached here.

Id. at 91,650. Apart from the factual distinction between the unregistered securities in *Manus* and the commodities traded on national exchanges in this case, the court's view of the present jurisdictional problem is not swayed by the New York court's dictum.

where the court found a similar affidavit insufficient to establish jurisdiction, the securities involved in the allegedly fraudulent scheme were not registered on American exchanges and were not intended to be sold within the United States. As the court reads *Bersch* and other similar cases, the need for plaintiffs to demonstrate a particularized harm to domestic interests only arises when domestic investors or exchanges are not directly involved. Conversely, in a case such as this, where the challenged transactions involve trading on domestic exchanges, harm can be presumed, because the fraud alleged implicates the integrity of the American market.

The court recognizes that no prior case has had to decide whether to sustain jurisdiction under the effects test solely on the basis that the securities involved were traded on American exchanges. The case law, however, does emphasize that "the absence of certain of the elements which led to finding subject matter jurisdiction in [prior] cases does not necessarily preclude a similar conclusion on the different facts presented here." *Bersch, supra*, 519 F.2d at 986. See also *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), "the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive," quoting *Continental Grain, supra*, 592 F.2d at 414. Applying this case-by-case approach here, the court concludes that it has jurisdiction under the effects test in this dispute involving the allegedly fraudulent solicitation of orders for American commodities.

The Conduct Test

The conduct test bases jurisdiction on conduct occurring within the United States. The residence or citizenship of the parties and the foreign or domestic nature of the securities involved, while relevant, is not the focus of inquiry; instead the courts concentrate on the relative importance of activities within the United States to the success of the alleged scheme to defraud. If such conduct is substantial rather than merely preparatory, incidental or fortuitous, the courts are more likely to find jurisdiction. This test derives from Restatement (Sec-

ond) of Foreign Relations Law of the United States § 17[7] and as a policy matter seeks to prevent the United States from being "used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975).

This test was first used in *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972). In *Leasco*, American plaintiffs alleged fraud in the sale of the securities of an English corporation that were not registered or traded on American exchanges and were not sold within the United States. The court upheld jurisdiction because "substantial misrepresentations" were made within this country. 468 F.2d at 1339. Since *Leasco*, courts have focused on defining the limits of the conduct test.

In *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973), the facts paralleled those in *Leasco*. American plaintiffs sued Canadian defendants over a tender offer and merger involving Canadian securities that were not registered or traded on American exchanges. The plaintiffs alleged that they were led to believe that if they retained their stock until after a tender offer had been made to Canadian shareholders, a separate tender offer would be made to them and other United States shareholders. The court reasoned that subject matter jurisdiction depended on the existence of "significant conduct with respect to the alleged violations in the United States." 473 F.2d at 524.

In finding such significant conduct, the court noted that the plaintiffs alleged that the mails and telephones had been used

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7 § 17. Jurisdiction to Prescribe with Respect to Conduct, Thing, Status or Other Interest within Territory.

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory.

to communicate misrepresentations. The court also considered as "significant contacts" within the United States the closing of the ultimate sale of the plaintiffs' shares (which took place in St. Louis, Missouri) and communications leading thereto "even though they were made at a time when the plaintiffs were aware of the defendants' true intentions and were thus not misleading." 473 F.2d at 527. The court reasoned:

> These contacts were the final stage of the defendants' alleged scheme to defraud the named plaintiffs which began with the limitation of the tender offer to Anthes Canadian shareholders and continued on through the acquisition of plaintiffs' shares by [one of the defendants.] They were essential to the alleged scheme and may not be ignored in determining the propriety of subject matter jurisdiction.

Id. Similarly, in *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3rd Cir. 1976), one of the factors that the court relied upon to establish sufficient conduct within the United States was that the stock involved had been traded on an American over-the-counter exchange.

In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975), the Second Circuit cut back on the reach of the conduct test, stating:

> [W]e see no reason to extend it to cases where the United States activities are merely preparatory . . . and are relatively small in comparison to those abroad.

See also *Vencap, supra*, 519 F.2d at 1018, where the court indicated:

> [J]urisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries. . . .

Appendix C

Conduct that occurs within the United States by chance or merely for convenience is also insufficient for jurisdictional purposes. *Leasco, supra*, 468 F.2d at 1338 (2d Cir. 1972) (dictum; no jurisdiction when a German and a Japanese meet in New York for convenience and the latter fraudulently induces the former to purchase Japanese securities on the Tokyo Stock Exchange); *Grunenthal GmbH v. Hotz*, 511 F.Supp. 582, 583, 588 (C.D.Cal. 1981). In *Grunenthal*, all the parties were foreign nationals or corporations; the securities involved were foreign and not traded on any American exchange; the negotiations involved conduct in four countries, including the United States; and the conduct in each country was of relatively equal importance. The challenged transaction, however, was concluded within the United States because one of the defendants was here on a temporary non-immigrant visa for business. The court concluded that the fact that the transaction was concluded here was insufficient because it found that this was only a matter of convenience.

Bache Lebanon argues that the conduct of Bache Delaware and its agents that occurred within the United States was determined to be lawful in the arbitration proceedings and "it follows that all of the activity, if any, constituting the violations must, of necessity, have occurred outside the United States. We are thus left with a case of an alleged fraud on foreigners by a foreign corporation in a foreign country." (Def. Memo in Support at 14.) The Tamaris argue that Bache Lebanon wired the orders it solicited from them to Bache Delaware in Chicago, Illinois, for execution on the Chicago exchanges.[8] They

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8 In its reply brief, Bache Lebanon asserts that it wired at least some of the Tamaris' orders to London and that the orders were then wired from London to the United States on Bache Delaware's "Hassler System." "In essence," Bache Lebanon argues, "*Bache Delaware* not Bache Lebanon, wired the orders from London to within the United States." (Def. Reply Memo at 5 n.3) (emphasis in original). The Hassler System is a private wire system. Testimony establishes that, with this system, an order is teletyped on the system from a branch in Beirut to a central computer in London, where it is

further contend that these transmission constitute conduct within the United States and that such conduct is sufficient to confer jurisdiction.

Several courts have found that making phone calls or sending mail to the United States should be deemed conduct within the United States for jurisdictional purposes in transnational cases. *E.g., Continental Grain, supra,* 592 F.2d at 420 n.18:

> Both the place of sending and the place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used to transmit communications;

Travis, supra, 473 F.2d at 524 n.16; *Leasco, supra,* 468 F.2d at 1335. Thus, Bache Lebanon's transmission of the Tamaris' orders from Beiruit to Chicago constitutes conduct within the United States.

The court determines, moreover, that such conduct is substantial or significant when viewed in relation to its importance to the success of the alleged scheme to defraud. As in *Travis, supra,* 473 F.2d at 527, Bache Lebanon's wiring the Tamaris' orders to Chicago and the execution of those orders on the Chicago exchanges were the final steps in the alleged scheme. And again as in *Travis,* the "lawfulness" of Bache Delaware's execution of the orders, as found by the arbitrators, does not cure any prior fraud in Bache Lebanon's solicitations from the Tamaris, nor does it prevent the execution of the orders from

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almost simultaneously relayed to the United States by the computer. (Dep. of Mr. Fivian, pp.12-13). In light of this testimony, the court assumes for purposes of this motion (without, however, finding such to be a fact on the merits, see *Grunenthal, supra,* 511 F.Supp. at 584 n.2) that Bache Lebanon's use of this system constituted a communication from outside to within the United States. Moreover, there is testimony suggesting that the Hassler System could be bypassed and an order placed directly by phone. (Dep. of Mr. Fivian, p. 14). Whether any of the Tamaris orders were directly telephoned from Beiruit to Chicago is not clear from this record.

being a necessary and foreseeable step in a scheme to defraud, and thus substantial conduct within the United States. On the basis of these transmissions, therefore, the court finds subject matter jurisdiction under the conduct test.

Collateral Estoppel

Bache Lebanon argues that the Tamaris, in their complaint, allege the same violations that were the subject of the arbitration proceedings between the Tamaris and Bache Delaware, that "all actions taken by Bache Lebanon in connection with the Tamaris' accounts were taken by Bache Lebanon as agent for Bache Delaware" (Def. Memo in Support at 15-16), and therefore that the arbitral decision in Bache Delaware's favor constitutes an adjudication that Bache Lebanon's actions were proper and lawful. Bache Lebanon was not a party to the arbitration; thus, if it is to rely on the decision there, it must show that it is entitled to do so under principles of collateral estoppel.

Once before in this litigation Bache Lebanon raised this identical argument, that the arbitral decision collaterally estops the Tamaris from proceeding against it. This was the subject of a motion to dismiss, treated as a motion for summary judgment, that Bache Lebanon argued to Judge Grady when this case was assigned to him. In a memorandum opinion dated March 17, 1978, Judge Grady rejected Bache Lebanon's argument and denied its motion.

In his opinion, Judge Grady made three points: he concluded that it was impossible to tell what the arbitration panel had decided regarding Bache Lebanon's conduct due to the absence of any express findings; that at least one issue—that of Bache Lebanon's independent liability—could not be precluded by the decision in any case; and that the totality of the circumstances established that it would be inequitable to apply the doctrine of collateral estoppel in this case. Bache Lebanon has not persuaded this court that Judge Grady's conclusions were incorrect.

Appendix C

Right of Action

Bache Lebanon's final argument, that there is no implied private right of action under Sections 4b and 4c of the CEA, 7 U.S.C. §§ 6b and 6c, can be quickly answered. Prior to the 1974 amendments to the CEA, federal courts had routinely recognized a private cause of action under the statute, and in the recent case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, ___ U.S. ___, ___, 102 S.Ct. 1825, 1842, 72 L.Ed.2d 182 (1982), the Supreme Court held that the private cause of action survived the 1974 amendments.

Bache Lebanon also argues that no private right of action exists for violations of the rules of the exchanges involved, but the court need not decide this issue. The Tamaris' complaint alleges violations of CBOT Rules Nos. 210, 1822(8), (12), (14) and (15), 1822-A and 1990, and violations of CME Rules Nos. 928 and 942. All of these rules regulate the conduct of members of the respective exchanges. Bache Lebanon, however, is not a member of either the CBOT or the CME. The Tamaris cannot base a cause of action against Bache Lebanon on any violation of the exchange rules, and to the extent that their complaint is based on such violations, Bache Lebanon's motion is granted.

Conclusion

Bache Lebanon's motion for judgment on the pleadings or, in the alternative, for summary judgment is denied, except that it is granted as to all claims based on violations of the commodity exchanges' rules.

APPENDIX D

Appendix D

SEC. 4b. It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling

order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this Act shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of cotton for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided*, That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange.

SEC. 4c. It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or by products thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale," "cross trade," or "accommodation trade," or is a fictitious sale;

(B) if such transaction is, is of the character of, or is commonly known to the trade as, a "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or

(C) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity trans-

actions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall not have been disapproved by the Secretary of Agriculture. Nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections.

APPENDIX E

Appendix E

FOREIGN OFFICES AND FOREIGN REPRESENTATIVES

Arranged Alphabetically as to Countries and Cities

ARAB EMIRATES (UNION OF)

Cairo

Kidder, Peabody & Co. Incorporated
9 Had el Laban Street
Garden City
(Kidder, Peabody & Co., Ltd.)

Dubai

Hutton (E.F.) & Company, Inc.
Chamber of Commerce Bldg.,
P.O. Box 5241

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Union of Arab Emirates
P.O. Box 3911 Al Fuleij Bldg.

ARGENTINA

Buenos Aires

Becker (A.G.) Paribas Incorporated
LaValle 648, 1047

Merrill Lynch, Pierce, Fenner & Smith de Argentina
San Martin 323 Piso 13

Prudential-Bache Securities, Inc.
25 De Mao 537, Piso 14

AUSTRALIA

Melbourne

First Boston Corporaton
535 Bourke St.

Appendix E

AUSTRIA

Vienna

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Tegetthoffstrasse NBR 1, A-1015

BAHRAIN

Manama

Hutton (E.F.) & Company Inc.
Unitag House, Mezzanine Floor
Government Rd.
P.O. Box 82

BELGIUM

Brussels

Dominick & Dominick Incorporated
Rue de L'Aurore 2

Drexel Burnham Lambert Incorporated
5, Boulevard de l'Empereur
(Burnham Securities, S.A.)

First Manhattan Co.
203 Avenue Louise

Hutton (E.F.) & Company Inc.
10 Place Du Champ De Mars

Laidlaw Adams & Peck, Inc.
15 Rue Blanche

Merrill Lynch, Pierce, Fenner & Smith Incorporated
221 Avenue Louise
(Merrill Lynch, Pierce, Fenner & Smith Belge S.A.)

Prudential-Bache Securities, Inc.
Marubeni Bldg., 7th Fl.,
283 Ave. Louise, Box 11

Shearson/American Express Inc.
368 Ave. Louise

Thomson McKinnon Securities Inc.
43 Rue de Namur

CANADA

ALBERTA

Calgary

Merrill Lynch, Pierce, Fenner & Smith Incorporated
480 7th Ave. S.W.
(Royal Securities Corp. Ltd.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
480 7th Avenue, S.W. Bentall Bldg.

Prudential-Bache Securities, Inc.
220 Three Calgary Place

Edmonton

Merrill Lynch, Pierce, Fenner & Smith Incorporated
10M-10303 Jasper Ave.
(Royal Securities Corp., Ltd.)

Prudential-Bache Securities, Inc.
820-10025 Jasper Ave.

Montreal

Dean Witter Reynolds Inc.
635 Dorchester Blvd. West

Vancouver

Merrill Lynch, Pierce, Fenner & Smith Incorporated
200 Granville St.

Merrill Lynch, Pierce, Fenner & Smith Incorporated
544 Howe Street
(Royal Securities Corp., Ltd.)

Paine, Webber, Jackson & Curtis Inc.
595 Howe St., Ste. 1115

Prudential-Bache Securities, Inc.
MacMillan Bloedel Bldg.,
1075 West Georgia St.

Victoria

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Royal Trust Bldg.
(Royal Securities Corp., Ltd.)

MANITOBA

Winnipeg

Merrill Lynch, Pierce, Fenner & Smith Incorporated
1300 One Lombard Pl.
(Royal Securities Corp., Ltd.)

NEW BRUNSWICK

St. John

Merrill Lynch, Pierce, Fenner & Smith Incorporated
44 Prince William Street
(Royal Securities Corp., Ltd.)

NEWFOUNDLAND

St. John's

Merrill Lynch, Pierce, Fenner & Smith Incorporated
139 Water Street
(Royal Securities Corp., Ltd.)

NOVA SCOTIA

Halifax

Merrill Lynch, Pierce, Fenner & Smith Incorporated
300 Barrington Tower
Scotia Square B3J 2A8
(Royal Securities Corp., Ltd.)

Appendix E

ONTARIO

Hamilton

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Canada Trust Bldg.
(Royal Securities Corp., Ltd.)

Montreal

Dean Witter Reynolds Inc.
635 Dorchester Blvd. West

First Boston Corporation
1155 Dorchester Blvd. West

Ottawa

Merrill Lynch, Pierce, Fenner & Smith Incorporated
151 Sparks St., La Promenade

Toronto

Dean Witter Reynolds Inc.
181 University Avenue

Dominick & Dominick Incorporated
111 Royal Trust Tower,
Toronto Dominion Center,
P.O. Box 272
(Dominick Corp. of Canada)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Toronto-Dominion Centre
(Royal Securities Corp., Ltd.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
11 King West

Midland Doherty Inc.
Commercial Union Tower,
P.O. Box 25, Toronto Dominion Centre

Prudential-Bache Securities, Inc.
18 King St., East

Shearson/American Express Inc.
55 University Ave., Ste. 501

Appendix E

PRINCE EDWARD ISLAND

Charlottetown

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Grafton St.
(Royal Securities Corp. Ltd.)

QUEBEC

Montreal

Dominick & Dominick Incorporated
Place Ville Marie
(Dominick Corp. of Canada)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
800 Dorchester Boulevard, West

Merrill Lynch, Pierce, Fenner & Smith Incorporated
800 Victoria Sq.
(Royal Securities Corp., Ltd.)

Prudential-Bache Securities, Inc.
4 Westmount Sq., Ste. 160

Shearson/American Express Inc.
Capital Centre,
1200 McGill College Ave.

Transatlantic Securities Company*
1155 Sherbrooke West., Ste. 1401

Quebec

Merrill Lynch, Pierce, Fenner & Smith Incorporated
220 Grand Alles
(Royal Securities Corp., Ltd.)

CHILE

Santiago

Shearson/American Express Inc.
Augustinas 1360, 4th Fl.

Appendix E

ENGLAND

Bradford

Prudential-Bache Securities, Inc.
Five Wool Exchange

London

Bear, Stearns & Co.
10-12 Copthall Ave.

Becker (A.G.) Paribas Incorporated
17/19 Lincoln's Inn Fields

Brown Brothers Harriman & Co.
Prince Rupert House
64 Queen Street

Burns Fry and Timmins, Inc.
9 Bosinghall Street

Dean Witter Reynolds Inc.
One Throgmorton Avenue

Dean Witter Reynolds Inc.
56 Leadenhall Street
(Dean Witter International, Ltd.)

Dillon, Read & Co. Inc.
10 Cheaterfield St.

Dominick & Dominick Incorporated
8 Little Trinity Lane

Donaldson, Lufkin & Jenrette Securities Corporation
22 Austin Friars

Drexel Burnham Lambert Incorporated
Winchester House
77 London Wall

Eberstadt (F.) & Co., Inc.
Brettenham House
Lancaster Pl.

Fahnestock & Co.
62 London Wall

First Boston Corporation
22 Bishopsgate, 3rd Fl.

Goldman, Sachs & Co.
40 Basinghall Street,
(Goldman Sachs International Corp.)

Hambrecht & Quist Incorporated
Queens House
8 Queens St., 2nd Fl.

Hutton (E.F.) & Company Inc.
58 Mark Lane
Cereal House

Hutton (E.F.) & Company Inc.
17 C. Curzon
(Hutton (E.F.) International)

Kidder, Peabody & Co. Incorporated
99 Bishopsgate
(Kidder, Peabody & Co., Ltd.)

Ladenburg, Thalmann & Co., Inc.
108 Cannen St.

Lehman Brothers Kuhn Loeb Incorporated
16 St. Martins LaGrand

Lehman Brothers Kuhn Loeb Incorporated
Commercial Union Bldg.

Merrill Lynch, Pierce, Fenner & Smith Incorporated
153 New Bond St.
(Merrill Lynch, Pierce, Fenner & Smith Ltd.)

Merrill Lynch, Pierce Fenner & Smith Incorporated
3-5 Newgate St.

Merrill Lynch, Pierce, Fenner & Smith Incorporated
P.O. Box 236
Black Swan House
Kennet Wharf Lane

Appendix E

Moseley, Hallgarten, Estabrook & Weeden, Inc.
Bilbao House
New Broad St., 4th Fl.

Neuberger & Berman
4 and 5 Grosvenor Pl.

Oppenheimer & Co., Inc.
Portland House
72-73 Basinghall St.

Ovest Securities, Inc.
Plantation House
Mincing Lane

Paine, Webber, Jackson & Curtis Incorporated
11/12 Finsbury Sq.

Pollock (Wm. E.) & Co. Inc.
114 Old Broad St.

Prudential-Bache Securities, Inc.
5 Burlington Gardens

Prudential-Bache Securities, Inc.
First Floor
Plantation House
Fenchurch St.

Prudential-Bache Securities, Inc.
River House 119-121
Minories

Roulston Research Corp.
55 New Bond Street

Salomon Brothers Inc.
One Angel Court
(Salomon Brothers International Ltd.—Corporate Affiliate)

Seeman (Aubrey N.) & Co., Inc.
Salisbury House
Finsbury Circus

Seligmann, Harris and Co., Inc.
Friendly House
21-24 Chiswell Street

Shearson/American Express Inc.
16 Moorfields
High Walk

Shearson/American Express Inc.
Saint Alphage House
2 Foure Street

Smith Barney, Harris Upham & Co. Incorporated
Brewers' Hall
Aldermanbury Sq.

Smith Barney, Harris Upham & Co. Incorporated
18 Finsbury Circus

Thomson McKinnon Securities Inc.
55 London Wall

Wertheim & Co.
54/55 London Wall

FRANCE

Paris

Bear, Stearns & Co.
7 Rue Drouot, 75009

Brown Brothers Harriman & Co.
17 Ave. Matignon
(Brown Harriman Corp.)

Dean Witter Reynolds Inc.
10, Rue de la Paix

Donaldson, Lufkin & Jenrette Securities Corporation
42 Avenue Montaigne

Drexel Burnham Lambert Incorporated
23 Place Vendome
(Burnham and Company, S.A.R.L.)

Appendix E

Eberstadt (F.) & Co., Inc.
8 Place Vendome

Fahnestock & Co.
5 Rue Gaillon 2 EME

Hutton (E.F.) & Company Inc.
43 Avenue Marceau, 75116

Kidder, Peabody & Co. Incorporated
422, Rue Saint Honore
(Kidder, Peabody S.A.)

Ladenburg, Thalmann & Co., Inc.
28 Rue des Petites-Ecuries

Laidlaw Adams & Peck, Inc.
42 Ave. Friedland

Merrill Lynch, Pierce, Fenner & Smith Incorporated
25 Avenue des Champs-Elysee
(Merrill Lynch, Pierce, Fenner & Smith S.A.F.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
142 Boulevard Haussman

Merrill Lynch, Pierce, Fenner & Smith Incorporated
4, Rue Saint-Florentin, 75
(Merrill Lynch, Pierce, Fenner & Smith Securities Underwriter Limited)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
96 Avenue D'Iena

Moore & Schley, Cameron & Co.
120 Ave. des Champs Elysees
(du Pasquier et Cie, S.A.R.L.)

Moseley, Hallgarten, Estabrook & Weeden Inc.
125 Champs Elysee

Paine, Webber, Jackson & Curtis Inc.
41 Avenue George V

Paine, Webber, Jackson & Curtis Incorporated
10 Rue Duphot, 75001

Prudential-Bache Securities, Inc.
6 Rue Royale

Prudential-Bache Securities, Inc.
370 Rue St. Honore

Shearson/American Express Inc.
12114 Rond-Point Champs Elysees

Smith Barney, Harris Upham & Co. Incorporated
7, Place Vendome

Stralem & Company Incorporated
30, Ave. Marceau

Thomson McKinnon Securities Inc.
23 Rue Royale

Wertheim & Co.
4, Place de la Concorde
(Wertheim & Cie., S.A.)

Wertheim & Co., Inc.
23 Boulevard Haussman, 75009

GERMANY

Dusseldorf

Dean Witter Reynolds Inc.
Konigsalle 88

Merrill Lynch, Pierce, Fenner & Smith Incorporated
KOE Center Bldg.
Koenig Sallee 30

Prudential-Bache Securities, Inc.
Benrather/Ecke
Kasernenstrasse, 4000

Frankfurt

Dean Witter Reynolds Inc.
Westendstrasse 8, 6000

Dominick & Dominick Incorporated
Westendrasse 28

Hutton (E.F.) & Company Inc.
6000 Frankfurt 1
Bockenheimer Landstrasse 51-53
Rhein-Main-Ctr.

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Ulmenstrasse 30, 6000
Frankfurt/Main, Germany
(Merrill Lynch, Pierce, Fenner & Smith International Limited)

Moseley, Hallgarten, Estabrook & Weeden, Inc.
Friedrichsstrasse 34, 6000

Prudential-Bache Securities, Inc.
Wiesenhuettenstrasse 18

Roulston Research Corp.
17 Unterlindau

Shearson/American Express Inc.
Mainzer Landstrasse 27-31
6000 Frankfurt/Main

Thomson McKinnon Securities Inc.
Hochstrasse 43

Hamburg

Dominick & Dominick Incorporated
Grosse Bleichier 32
2000 Hamburg 36

Hutton (E.F.) & Company Inc.
Hamburgerof
Jungfernstieg 30, 5000

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Paul Strasse 3

Prudential-Bache Securities, Inc.
Neuer Wall 10, 2000

Shearson/American Express Inc.
Neuer Wall 84

Munich

Prudential-Bache Securities Inc.
Ludwigstrasse 8

Dean Witter Reynolds Inc.
Sonnenstrasse 1

Fahnestock & Co.
Frauenplatz 11

Hutton (E.F.) & Company Inc.
Odeonsplatz 18

Stuttgart

Dominick & Dominick Incorporated
Calwerstrasse 19

Prudential-Bache Securities, Inc.
Koenigstrasse 1A, 5-7000

GREECE

Athens

Droulia & Co.
3 Stadiou Street

Hutton (E.F.) & Company Inc.
Vassilissis Sophias 1201

Merrill Lynch, Pierce, Fenner & Smith Incorporated
17 Hellas L.L.C.
Valooriton Street

Paine, Webber, Jackson & Curtis Inc.
(International)
Koumbari #4

Prudential-Bache Securities, Inc.
5 Koumbari St.

Appendix E

GUAM

Agana

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Julale Shopping Center

HOLLAND

Amsterdam

Bear, Stearns & Co.
Singel 540

Drexel Burnham Lambert Incorporated
Signel 540

Herzfeld & Stern
Singel 160

Hutton (E.F.) & Company, Inc.
Dam 21

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Weesperstraat 107
(Merrill Lynch, Pierce, Fenner & Smith International Limited)

Prudential-Bache Securities, Inc.
Geboaw Rivierstaete
Amsteldijk 166

Shearson/American Express Inc.
491 Herengracht

Rotterdam

Merrill Lynch, Pierce, Fenner & Smith Incorporated
30 Korte Hoogstraat

HONG KONG (B.C.C.)

Hong Kong

Dean Witter Reynolds Inc.
(Dean Witter Reynolds International Inc.)
1501 Gloucester Tower

Donaldson, Lufkin & Jenrette Securities Corporation
Bank of America Tower,
12 Harcourt Rd., Ste. 1008

Drexel Burnham Lambert Incorporated
2708 New World Tower
Queen's Rd. Central

Drexel Burnham Lambert Incorporated
World Wide House
Des Voeux Rd., Rm. 2002

Kidder, Peabody & Co. Incorporated
Rooms 1707-1709
Connaught Center
Connaught Road, Central
(Kidder, Peabody & Co., Ltd.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
St. George's Bldg.
2 Ice House Street
(Merrill Lynch, Pierce, Fenner & Smith International Limited)

Paine, Webber, Jackson & Curtis Incorporated
St. George's Bldg.
2 Icehouse Street

Prudential-Bache Securities, Inc.
Shell House
Queens Road Central

Salomon Brothers Inc.
2907 Alexandra House
16-20 Charter Rd.

Schwab (Charles) & Co. Inc.
The Bank of America Tower, 7th Floor
12 Harcourt Road

Shearson/American Express Inc.
St. Georgia's Bldg.
2 Ice House St.
(Shearson Hayden Stone Far East Limited, subsidiary)

Appendix E

ITALY

Milan

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Via Hoepli 7
(Merrill Lynch, Pierce, Fenner & Smith S.P.A)

Rome

Dean Witter Reynolds Inc.
Via Bertoloni 57

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Via Carducci 10
(Merrill Lynch, Pierce, Fenner & Smith S.P.A.)

Thomson McKinnon Securities Inc.
8 Via Lacullo

JAPAN

Tokyo

Becker (A.G.) Paribas Incorporated
Yurakucho Denki Bldg.
7-1 Yurakucho-Cham
Chiyoda-Ku

Drexel Burnham Lambert Incorporated
Ste. 430, Fuji Bldg.
2-3 Marunouchi 3 Chome
Chiyoda-Ku

First Boston Corporation
Kokusai, Bldg.
1-1 Marunouchi, 3-Chome
Chiyoda-Ku

Goldman, Sachs & Co.
704 Yurakucho Bldg., 7th Fl.
1-10-1 Yurakucho
Chiyoda-Ku
(Goldman Sachs International Corp.)

Kidder, Peabody & Co. Incorporated
AIU Bldg.
1-3 Maranouchi, 1-chome
Chiyoda-Ku

Lehman Brothers Kuhn Loeb Incorporated
P.O. Box 127
Kasumigaseki Bldg.
3-2-5 Kasumigaseki, Ste. 2618
Chiyoda-Ku
(Kuhn, Loeb & Co. Asia)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Toranomon-Mitsui Bldg. 8-1
Kasumi Gaseki, 3-Chome
Chiyoda-Ku
(Merrill Lynch, Pierce, Fenner & Smith S.A.)

Paine, Webber, Jackson & Curtis Incorporated
AIV Bldg., 5th Floor
1-3 Marunouchi, 1 Chome
Chiyoda-Ku

Salomon Brothers Inc.
Fukoku Seimei Bldg., 22
Uchisaiwai-Cho, 2 Chome
Chiyoda-ku

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Beirut

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Merrill Lynch, Pierce, Fenner & Smith Incorporated
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Appendix E

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Monte Carlo

Hutton (E.F.) & Company
Le Montaigne
7/9 Ave., De Grande

Prudential-Bache Securities, Inc.
Sporting d'Hiver

Shearson/American Express Inc.
Park Place
25 Ave., De La Costa

Thomson McKinnon Securities Inc.
Le Schuylkill
19 Blvd. De Suisse

KOREA

Seoul

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Hankook Ilbo Bldg.
14 Chung Hak-Dong
Chongnoku

NETHERLANDS, ANTILLES

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Merrill Lynch House, 51
Frederiksplein

Prudential-Bache Securities, Inc.
Geboaw Riverstaeter
Amsteldijk 166

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Panama

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Apartado 8065

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Makati Rizal
P.O. Box 7110 Mia Airmail Exchange Ctr. 3120

PUERTO RICO

Hato Rey

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Banco de Ponce Bldg., 268
Munoz Rivera Ave.

First Boston Corporation (The)
Banco Popular Ctr.

Kidder, Peabody & Co. Incorporated
920 Banco Popular Center

Philips, Appel & Walden, Inc.
Banco de Ponce Bldg., Mezzanine Fl.

Raymond, James & Associates, Inc.
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Appendix E

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Paine, Webber, Jackson & Curtis, Inc.
Chase Manhattan Bank Bldg.

Prudential-Bache Securities, Inc.
255 Ponce de Leon Avenue and Bolivia Street

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Singapore

Dean Witter Reynolds Inc.
4108 O.C.B.C. Centre, Chulia St.

Drexel Burnham Lambert Incorporated
5 Shenton Way, 22-03 UIC Bldg.
Singapore 0106

Merrill Lynch, Pierce, Fenner & Smith Incorporated
18th Fl., Shing Kwanhouse, Shenton Way

Prudential-Bache Securities, Inc.
Ste. 1402, UOB Building, 1 Bonham St.

Shearson/American Express Inc.
1201-1205 12th Fl.,
Shing Kwan House, 4 Shenton Way

SPAIN

Barcelona

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Avinguda Diagonal 534
(Merrill Lynch, Pierce, Fenner & Smith Espanola, S.A.)

Madrid

Drexel Burnham Lambert Incorporated
Gorbea 2, Paseo De La Castillana 149

Hutton (E.F.) & Company, Inc.
Calle Fortuny 39

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Edificio Piramide, 7th Floor, Paseo de la Castellana 31
(Merrill Lynch, Pierce, Fenner & Smith Espanola S.A.)

Prudential-Bache Securities, Inc.
Alcala 32

Shearson/American Express Inc.
63 Avenida Del Generalisimo

SWITZERLAND

Basle

Dominick & Dominick Incorporated
Aeschengraben 10

Shearson/American Express Inc.
Asschenvoistadt 55

Chesieres

Donaldson, Lufkin & Jenrette Securities Corporation
Case Postale 55, 1885 Chesieres

Chiasso

Prudential-Bache Securities, Inc.
6830 Via Valdani 2

Geneva

Baird, Patrick & Co., Inc.
9 Rue Calvin

Bear, Stearns & Co.
P.O. Box 40, 30 Rue du Rhone 1211

Appendix E

Becker (A.G.) Paribas Incorporated
16 Ave. Eugene-Pittard
(Becker Securities Incorporated S.A.)

Dean Witter Reynolds Inc.
7, Rue Versonnex

Drexel Burnham Lambert Incorporated
P.O. Box 290

Eberstadt (F.) & Co., Inc.
24 Avenue de Champel

First Boston Corporation
No. 7 Place du Molard

Herzfeld & Stern
14 Avenue Ernest Hentsch

Hutton (E.F.) & Company Inc.
9 Place du Bourg-de-Four

Kidder, Peabody & Co. Incorporated
11, Cours de Rive, 211 Geneva 3
(Kidder, Peabody, Geneve S.A.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
65 Rue du Rhone
(Merrill Lynch, Pierce, Fenner & Smith S.A.)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
31 Rue du Rhone

Merrill Lynch, Pierce, Fenner & Smith Incorporated
62 Rue du Rhone

Moseley, Hallgarten, Estabrook & Weeden, Inc.
Cours de Rive 4

Paine, Webber, Jackson & Curtis Inc.
3 Place St. Gervais

Prudential-Bache Securities, Inc.
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Rothschild (L.F.), Unterberg, Towbin
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Shearson/American Express Inc.
P.O. Box 1211, One Place Longemalle

Smith Barney, Harris Upham & Co. Incorporated
6-8 Rue de Candolle

Stralem & Company Incorporated
6, Ave. de Frontenex

Lausanne

Dean Witter Reynolds Inc.
10 Ave. de la Gare

Dominick & Dominick Incorporated
Rue St. Martin 7

Droulia & Co.
2 Place St. Francois

Shearson/American Express Inc.
2 Place Pepinet

Lugano

Hutton (E.F.) & Company Inc.
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Merrill Lynch, Pierce, Fenner & Smith Incorporated
Via Balestra 27, 6900
(Merrill Lynch, Pierce, Fenner & Smith, S.A.)

Prudential-Bache Securities, Inc.
Via Pioda 9

Shearson/American Express Inc.
Viali Ste Fani Franscini 22

Thomson McKinnon Securities Inc.
Via Cantonale-16

Tucker, Anthony & R.L. Day, Inc.
Piazza Monte Ceneri 9

Zurich

Brown Brothers Harriman & Co.
Stockerstrasse 38
(Brown Brothers Harriman Services AG)

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Drexel Burnham Lambert Incorporated
Limmat quai 112

Hutton (E.F.) & Company Inc.
Kuttelgasse 4

Lawrence (Cyrus J.) Incorported
Bleicherwig 7, 8002

Merrill Lynch, Pierce, Fenner & Smith Incorporated
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Prudential-Bache Securities, Inc.
Bahnhofstrasse 106

Smith Barney, Harris Upham & Co. Incorporated
Gartenstrasse 25

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Appendix E

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9 Norre Gade, Charlotte Amailie

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(Merrill Lynch, Pierce, Fenner & Smith Venezolana S.R.L.)

No. 83-1904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACHE & CO. (LEBANON) S.A.L.,
a Lebanese Corporation,
Petitioner,

v.

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC. AND TEN UNITED STATES FUTURES EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

AND

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the implied private right of action under Section 4b of the Commodity Exchange Act should be expanded to include claims by foreign citizens-residents that their foreign brokerage firms engaged in fraudulent conduct exclusively in a foreign country in connection with the solicitation and operation of a futures trading account.

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IN THE

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a Lebanese Corporation,
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v.

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF FUTURES INDUSTRY ASSOCIATION, INC. AND TEN UNITED STATES FUTURES EXCHANGES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Futures Industry Association ("FIA") and ten United States futures exchanges ("Exchanges")[1] respectfully move, pursuant to Rule 36 of this Court, for leave to file the accompanying brief *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, filed on May 21, 1984 by Bache & Co. (Lebanon) S.A.L. The Peti-

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[1] Board of Trade of the City of Chicago; Chicago Mercantile Exchange, Inc.; Chicago Rice & Sugar Exchange; Coffee, Cocoa & Sugar Exchange; Commodity Exchange, Inc.; Kansas City Board of Trade; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; New York Cotton Exchange; and New York Mercantile Exchange.

tioner consented to the filing of the FIA-Exchanges *amici curiae* brief, but the Respondents have refused such consent.

The question presented by the Petition is whether the Seventh Circuit erred in finding that United States courts have jurisdiction to entertain a fraud claim under the Commodity Exchange Act ("CEA") brought by a foreign citizen-resident against his foreign brokerage firm where the alleged misconduct occurred solely in a foreign country in connection with a futures trading account.

The FIA is a not-for-profit corporation whose members are comprised of futures commission merchants ("FCMs"), commercial users of futures markets and others involved in futures trading. Primarily, FIA acts as a principal spokesman on behalf of the multi-billion dollar futures industry. The Exchanges provide a marketplace where futures contracts may lawfully be traded in the United States. *See* Section 4(a) of the CEA, 7 U.S.C. § 6(a) (1982). The Exchanges are charged by statute with important self-regulatory responsibilities relating to the integrity of futures trading. Sections 5 and 5a of the CEA, 7 U.S.C. §§ 7 and 7a (1982).

FIA and the Exchanges represent the great majority of the United States futures business and interests. FIA estimates that over 80 percent of all public trades are effected through FCMs who are FIA members. More than 97 percent of all United States futures contracts are traded through the Exchanges.

As principal spokesmen for and primary components of the United States futures industry, FIA and the Exchanges are obliged to address legal decisions based on errors of law or fact that threaten to have an adverse impact upon futures trading. The Court of Appeals' decision is based on such errors.

The Court of Appeals concluded that the transmission of a customer order by a foreign brokerage firm to the United States constituted substantial conduct within the United States justifying the application of the antifraud provision in Section 4b of the CEA, 7 U.S.C. § 6b (1982), to the foreign firm. Unless reversed by this Court, this decision will reduce liquidity on the United States futures markets, an essential feature of successful futures trading, by chilling foreign market participants who will fear that their foreign customer-broker relationships will be governed by United States laws if they engage in such trading. In addition, this decision could substantially increase the litigation exposure of both FCMs who receive foreign customer orders from foreign brokers and the futures exchanges whose members execute those orders.

FIA and the Exchanges believe that the instant case involves significant issues of public policy involving international commerce generally and futures trading specifically. Moreover, the Court of Appeals' decision was based upon serious misperceptions of law and fact relating to futures trading and the CEA. The Petition of Bache Lebanon, while forceful and compelling, does not fully discuss and emphasize all of these errors and policy considerations.

Therefore, FIA and the Exchanges respectfully move this Court for leave to file their accompanying brief *amici curiae.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1904

BACHE & CO. (LEBANON) S.A.L.,
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Petitioner,

v.

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICI CURIAE* OF FUTURES INDUSTRY ASSOCIATION, INC. AND TEN UNITED STATES FUTURES EXCHANGES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of the Futures Industry Association, Inc. ("FIA") and ten United States futures exchanges ("Exchanges"),[1] as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

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[1] Board of Trade of the City of Chicago; Chicago Mercantile Exchange, Inc.; Chicago Rice & Sugar Exchange; Coffee, Cocoa & Sugar Exchange; Commodity Exchange, Inc.; Kansas City Board of Trade; MidAmerica Commodity Exchange; Minneapolis Grain Exchange; New York Cotton Exchange; and New York Mercantile Exchange.

filed on May 21, 1984 by Bache & Co. (Lebanon) S.A.L. ("Bache Lebanon").

STATEMENT OF INTEREST

FIA is a not-for-profit corporation whose membership includes futures commission merchants ("FCMs"), commercial users of the futures markets and others involved in futures trading.[2] FIA estimates that its FCM members effect more than 80 percent of all futures contracts traded on United States exchanges on behalf of members of the public.

The Exchanges provide a marketplace for the trading of futures contracts in the United States. Futures contracts may lawfully be traded only on exchanges designated by a federal agency, the Commodity Futures Trading Commission ("CFTC"), as contract markets. Sections 4(a), 5 and 6 of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 6(a), 7 and 8 (1982). The Exchanges are CFTC-designated contract markets and over 97 percent of all United States futures contracts are traded through the Exchanges.

FIA and the Exchanges oppose the unwise and illogical extension of United States adjudicatory jurisdiction sanctioned by the Court of Appeals (App. B, A-12 - A-13). The Court of Appeals held that a foreign citizen-resident's fraud claim against a foreign brokerage firm, involving alleged misconduct occurring solely in a foreign country, is transformed into a private right of action under Section 4b of the CEA, 7 U.S.C. § 6b (1982), when the foreign firm transmits an order to the United States for a futures contract traded on a domestic exchange (App. B, A-12).

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[2] The important economic benefits of futures trading, the role of FCMs and exchanges, and the basic elements of the regulatory scheme under the Commodity Exchange Act are fully described in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 357-67 (1982).

1. FIA and the Exchanges have a substantial interest in this controversy. The Court of Appeals' opinion is grounded in numerous misperceptions about futures trading and the CEA that the *amici* have an obligation to correct. Furthermore, by authorizing United States courts to resolve disputes between foreign brokers and foreign customers involving exclusively foreign misconduct, the Court of Appeals' opinion conflicts directly with decisions of this Court and departs from established principles concerning the extraterritorial effect of United States laws.

2. The Court of Appeals' decision will affect adversely the liquidity of United States futures markets by creating a serious, if inadvertent, disincentive for foreign brokers and traders to use domestic markets. In the view of the Court of Appeals, once foreign firms forward foreign customer orders for domestic futures contracts, the relationship between the foreign firm and its foreign customer becomes subject to United States regulatory requirements set forth in the CEA and CFTC Rules.[3] To avoid the complexity and burdens of United States regulation, foreign firms will likely shift their foreign customers' trades from United States to foreign futures exchanges—*e.g.*, exchanges in London, Hong Kong or Japan. As a result, domestic futures market liquidity, which this Court has recognized as vital to successful futures trading, could suffer substantially. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 358-59 (1982).

3. The Court of Appeals' decision also unreasonably enlarges the litigation exposure of the Exchanges and FCMs. For the first time, foreign firms will be required to comply with all applicable CEA and, presumably, exchange requirements. Exchanges may have a correspond-

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[3] In contrast, the CFTC has recently reiterated that foreign brokers are not required to register as FCMs or comply with certain other requirements applicable to FCMs. 49 *Fed. Reg.* 14,721 n.4 (1984).

ing new duty to enforce their self-regulatory rules against nonmember foreign brokerage firms. The Exchanges therefore could be forced to litigate whether foreign customers may bring suits against exchanges for failing to enforce their rules against a foreign broker. *See* Section 22(b) of the CEA, 7 U.S.C. § 25(b) (1982).

Since foreign brokerage firms *must* place orders for United States futures contracts through exchange-member FCMs (Section 4(a) of the CEA, 7 U.S.C. § 6(a)), the jurisdictional nexus defined by the Court of Appeals undoubtedly will also enmesh many FCMs, particularly FCMs with foreign firm affiliates (*see, e.g.*, App. E), in foreign customer fraud suits under Section 4b of the CEA. Indeed, the Second Circuit has recently overturned the dismissal of a foreign customer's Section 4b claim against an FCM for an alleged fraud committed outside the United States by foreign brokers. *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (transmission of customer orders and trading on United States exchanges through FCMs constituted conduct "substantial enough to establish subject matter jurisdiction").

4. The Court of Appeals' opinion should be reviewed now. Analysis by this Court will serve to establish a unified, consistent judicial framework for determining when, if ever, foreign citizens may resort to United States courts to resolve foreign-based claims.[4] Conflicts

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[4] The Court of Appeals found both the "conduct" and "effects" tests to be satisfied by foreign customer-broker futures fraud (App. B, A-12 - A-13). The Second Circuit upheld jurisdiction solely on a "conduct" theory. *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983). The "conduct" and "effects" tests generally emanate from Sections 17 and 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965). Under one formulation, the conduct test looks to whether "significant conduct" occurred in the United States which was an "essential link" in the deception. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334-35 (2d Cir. 1972). The "effects"

among the Circuits on the specific CEA issue raised here are most unlikely. Approximately 98 percent or more of all futures contracts are executed on futures exchanges within the Seventh and Second Circuits. In these Circuits, it is now established that the receipt and execution of futures orders in the United States confers federal court jurisdiction over foreign fraud claims. Prospective foreign customer-plaintiffs therefore can be expected to file suit within either of these Circuits, rather than risk receiving a contrary ruling from another Circuit.

Accordingly, FIA and the Exchanges submit this brief *amici curiae* in support of the instant Petition.

SUMMARY OF ARGUMENT

The private remedy under Section 4b of the CEA established by this Court in *Merrill Lynch* should not apply to completely foreign disputes in the absence of compelling evidence of congressional intent. Under the CEA, the only available evidence indicates Congress did not intend foreign customers to be protected under Section 4b. Moreover, federal court jurisdiction may be invoked only where conduct in the United States constitutes an essential link in the alleged misconduct or has a demonstrably significant impact on important United States interests. The domestic conduct relied upon by the Court of Appeals to sustain United States jurisdiction was not essential, or even related, to the foreign customers' allegations. Rather, transmission of a futures contract order to an exchange-member is an innocuous step in the process of establishing a position in a United States futures contract. In addition, no impact on United States markets occurs if a foreign broker deceives a foreign cus-

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test is satisfied when conduct occurring outside the United States causes foreseeable, direct and substantial effects within the United States. *See Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 417 n.12 (8th Cir. 1979).

tomer. While such conduct is not to be condoned, the United States courts need not, and should not, resolve localized, inherently foreign disputes.

ARGUMENT

I. UNDER *MERRILL LYNCH v. CURRAN*, A PRIVATE RIGHT OF ACTION SHOULD NOT BE INFERRED UNDER SECTION 4b OF THE CEA FOR A FOREIGN CUSTOMER AGAINST A FOREIGN FIRM.

In *Merrill Lynch*, this Court authorized futures customers to bring private rights of action for fraud under Section 4b of the CEA, 7 U.S.C. § 6b. This decision was predicated upon two essential elements—(1) routine and consistent judicial recognition of private rights of action under Section 4b prior to 1974; and (2) substantial evidence of congressional intent to perpetuate the preexisting CEA private remedies when Congress amended the CEA in 1974. *Merrill Lynch*, 456 U.S. at 379-88. Specifically, this Court held "the private cause of action under the CEA that was previously available to investors survived the 1974 amendments." *Id.* at 388.

Prior to 1974, no court had permitted a foreign investor to sue a foreign firm under Section 4b of the CEA. Congressional action in 1974 cannot logically be found therefore to have perpetuated a previously unavailable private remedy. By allowing foreign customers to bring Section 4b claims, the Court of Appeals' ruling abridges the explicit limitation on CEA private remedies established in *Merrill Lynch*. Since foreign customers' fraud claims were not part of the "contemporary legal context" in 1974 (*Merrill Lynch*, 456 U.S. at 381), the private remedy enunciated in *Merrill Lynch* should not be drastically expanded to make these claims actionable now in federal court. *Cf. Merrill Lynch*, 456 U.S. at 408 n.17 (Powell, J., dissenting) (permitting an im-

plied right of action "will encourage the discovery of private causes of action of which Congress never dreamed").[5]

To be sure, new implied private rights of action may be inferred where unambiguous evidence exists of congressional intent to create a private remedy. *Merrill Lynch*, 456 U.S. at 378. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Here the Court of Appeals conceded that there is no "direct evidence" Congress intended Section 4b to apply to a foreign customer's claim against a foreign broker. (App. B, A-10) To the contrary, Congress clearly understands the CEA to cover only "frauds perpetrated on *United States residents* committed by persons located in or outside the United States . . . ." S. Rep. No. 384, 97th Cong., 2d Sess. 109 (1982) (emphasis added).[6] This congressional view reflects the well-settled presumption that Congress does not intend its enactments to cover primarily foreign conduct and disputes. *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Blackmer v.*

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[5] Judicial recognition of an implied private right of action under a particular statutory provision does not render the remedy available to all prospective plaintiffs alleging a violation of that provision. *See, e.g., Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

[6] In 1982, Congress confirmed that "protection of United States residents" is the sole focus of the CEA's customer protections by expressly authorizing the CFTC, under new Section 4(b) of the CEA, 7 U.S.C. § 6(b) (1982), to proscribe fraud by "those who vend foreign [exchange] futures from domestic locations." H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. 52 (1982). Through this enactment, Congress endorsed the central policy underlying the *amici*'s position—the law governing a localized customer-broker fraud claim should be the law of the site of the alleged core misconduct. Moreover, nothing in the language or legislative history of new Section 22 of the CEA, 7 U.S.C. § 25 (1982), even remotely suggests that Congress intended the express private remedy enacted in response to *Merrill Lynch* would be read to extend to a foreign customer's fraud claim against a foreign broker.

United States, 284 U.S. 421, 437 (1932). Accordingly, the Court of Appeals should have rejected the creation of a new federal remedy for foreign futures customers.

II. THE COURT OF APPEALS MISPERCEIVED THE INSIGNIFICANCE OF THE TRANSMISSION TO THE UNITED STATES OF A FUTURES CUSTOMER'S ORDER AND THEREFORE MISAPPLIED THE CONDUCT AND EFFECTS TESTS.

Bache Lebanon allegedly defrauded its customers, the Tamaris, in the opening and management of their futures trading accounts. (App. B, A-5 - A-7) While all the customer-broker contacts and cited misconduct occurred in Lebanon (App. B, A-7), and many of the Tamaris' futures transactions were effected on London exchanges (Pet. at 9 n.8), Bache Lebanon is being subjected to suit in the United States because it performed one customer service—"Bache Lebanon received futures orders from the Tamaris in Lebanon and transmitted them by wire to Bache Delaware for execution" on United States exchanges (App. B, A-6).

The Court of Appeals concluded that providing this customer service satisfied United States subject matter jurisdiction requirements under the "conduct" test (*see supra* n.4) because the transmission of futures customer orders is "an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges." (App. B, A-12) This conclusion is the fundamental flaw in the Court of Appeals' holding.

It is undisputed that Bache Lebanon acted lawfully and properly in forwarding the Tamaris' orders to the United States. Bache Lebanon merely effectuated the Tamaris' instructions by placing their trading orders with an exchange-member FCM. Bache Lebanon, like any other foreign broker whose customer places a United States futures order, had no discretion in this regard; domestic futures contracts must be "executed or consum-

mated by or through" exchange members. Section 4(a)(2) of the CEA, 7 U.S.C. § 6(a)(2) (1982). Thus, Bache Lebanon's innocent and legitimate forwarding of the Tamaris' orders to an exchange-member FCM should not be construed as any part, let alone a significant part, of an illegal scheme.

Bache Lebanon's order transmission was also immaterial in the context of the Tamaris' specific claim. The Tamaris allege that Bache Lebanon fraudulently induced them to open an account and then engaged in deception concerning the operation of the account. Any Bache Lebanon misconduct was consummated in Lebanon. The Tamaris could have asserted that Bache Lebanon committed the same fraudulent acts if it had never transmitted the futures orders, or if all the Tamaris' trades had been executed on London exchanges. The United States contacts and conduct were simply not essential to the Tamaris' allegations.

Ironically, if Bache Lebanon had not forwarded the Tamaris' orders to the United States, it would have engaged in a practice referred to as "bucketing." Bucketing customer orders expressly violates Section 4b(D) of the CEA, 7 U.S.C. § 6b(D) (1982). Under the Court of Appeals' reasoning, however, by bucketing its customers' orders, Bache Lebanon would have escaped the "essential step" in any futures fraud and thereby avoided suit in the United States.[7] Although purporting to promote en-

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[7] *Mormels v. Girofinance, S.A.*, 544 F. Supp. 815 (S.D.N.Y. 1982) demonstrates that the Court of Appeals' presumption that order transmission constitutes an essential step in a futures fraud is in error. In *Mormels*, Judge Weinfeld dismissed a foreign futures fraud claim against a domestic FCM because the alleged misconduct occurred overseas. The fraud scheme in *Mormels* involved United States futures trading to the same nonessential extent as in this case. Futures orders were transmitted and executed in the United States for a foreign customer's account. However, at least ten months after trading had begun for that account, the foreign broker converted his customer's funds. *Id.* at 817. Significantly, in

hanced customer protection, the Court of Appeals' decision thus creates an incentive for a foreign firm engaged in fraud to bucket its customers' orders.

The Court of Appeals would have avoided this inappropriate result by following the basic test that where the "essential core" of an alleged fraud occurs overseas, jurisdiction will not be found in United States courts. *Fidenas v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull, S.A.*, 606 F.2d 5, 8 (2d Cir. 1979). Rather than the core of any misconduct, any Bache Lebanon activities in the United States were "clearly secondary and ancillary." *Id.* at 8. Accordingly, the conduct test was not met here.

The Court of Appeals similarly erred in concluding that jurisdiction should be found under the "effects" test (*supra* n.4). The cited ephemeral and unsubstantiated "effects" on the United States futures markets caused by Bache Lebanon's conduct in Lebanon fall far short of the required level of demonstrable and substantial impact on United States interests. *See, e.g., Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-09 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969) (effects test satisfied where foreign misconduct directly impairs value of American investors' stock). The Court of Appeals stated that futures prices and volume "will be artificially influenced" by futures contracts executed on United States exchanges for defrauded foreign customers (App. B, A-12). However, no evidence appears in the record that the Tamaris' futures positions significantly affected the market price. Nor is there any empirical basis for the Court's conclusion that futures contracts entered into as a result of

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Mormels the customer's basic allegations parallelled those of the Tamaris: misrepresentation and mismanagement of a futures account. *Compare, Psimenos*, 722 F.2d at 1047 (distinguishing *Mormels* because "no act which directly caused Mormels' loss occurred in the United States").

fraud inherently have an artificial influence on market price.

Equally unsupportable is the Court of Appeals' concern that public confidence in the markets will be adversely affected unless foreign disputes are adjudicated in the United States. (App. B, A-12) Domestic futures trading will not be harmed if the conduct of a foreign broker in defrauding his customer is required to be addressed under the laws of the country where the fraud occurred. Moreover, the effects test should not be satisfied merely because United States products allegedly were improperly marketed abroad by foreign businessmen. The Court of Appeals' approach, however, could lead to an expansion of federal court jurisdiction to include claims that a foreign automobile salesman deceived a foreign citizen in a foreign country in connection with the sale of a United States manufactured automobile.

By greatly reducing the threshold of domestic conduct and effects required to establish jurisdiction in the United States courts, the Court of Appeals has encouraged foreign citizens to look to the already overworked United States judicial system for resolution of basic foreign customer-broker fraud claims. In addition, the Second and Seventh Circuits have mandated that foreign brokerage firms follow United States laws in dealing with foreign futures customers. As a result, for example, a German citizen-customer who trades United States futures contracts could bring a claim in federal court against a German brokerage firm, which is unaffiliated with any United States firm, alleging that the German firm violated the standards of care established by the CFTC and federal courts under Section 4b of the CEA.[8] Moreover,

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[8] In order to avoid liability for fraud under Section 4b of the CEA, foreign brokers will be required to furnish their foreign customers CFTC-mandated risk disclosure statements and satisfy all other requirements of Section 4b of the CEA. *See* CFTC Rule

domestic FCMs and futures exchanges might also be named as defendants in such an action (*see supra* at 3-4).

The Court of Appeals' decision therefore will cause foreign firms' conduct to be evaluated under United States statutes and in United States courts, rather than under the commercial norms and judicial system of the locale where the firms engage in business. This Court has already rejected the "parochial concept" that the United States can "have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252, (1981). Thus, review of the Court of Appeals' decision would promote principles of international comity previously established by this Court.

1.55, 17 C.F.R. § 1.55 (1983). Even compliance with CFTC regulations may not be sufficient for foreign brokers since the CFTC has asserted that a broker's disclosure obligations under Section 4b are not necessarily satisfied when a broker provides the CFTC-mandated risk disclosure. 47 *Fed. Reg.* 57,723 (1982).

CONCLUSION

The Court of Appeals' opinion contravenes numerous decisions of this Court, deviates from explicit congressional understanding under the CEA, misconstrues applicable principles governing extraterritorial application of United States law, misperceives fundamental elements of futures trading and regulation under the CEA, expands federal court jurisdiction far beyond the borders ever contemplated by Congress, and compels foreign businesses to comply with United States laws in order to continue to transact futures business for foreign clients. For the foregoing reasons, FIA and the Exchanges, as *amici curiae*, respectfully request that the petition of Bache Lebanon be granted.

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No. 83-1904 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACHE & CO. (LEBANON) S.A.L.,
a Lebanese corporation,

Petitioner,

—vs.—

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI,
co-partners d/b/a WAHBE TAMARI & SONS CO.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 20, 1984

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QUESTION PRESENTED

Should an exception to the rule giving U.S. courts subject matter jurisdiction over trades made on U.S. exchanges regulated under the Commodity Exchange Act (the "CEA") be created where the violations of those laws are perpetrated by foreign branches of U.S. brokers against foreign citizens?

LIST OF PARTIES TO THE APPEAL IN THE SEVENTH CIRCUIT

The names of all of the parties to the appeal in the Seventh Circuit are provided in the caption to the petition. Sup. Ct. R. 21.1(b). There are no subsidiaries or affiliates of the respondents.

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IN THE

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ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents respectfully request that the petition for a writ of certiorari seeking a review of the interlocutory order of the U.S. Court of Appeals for the Seventh Circuit entered on March 30, 1984, and reported at 730 F.2d 1103 be denied.

STATEMENT OF THE CASE

The petition seeks review of an interlocutory order denying a motion for summary judgment for lack of jurisdiction over the subject matter. As set forth in the complaint and supporting affidavit, the subject matter involves claims under §§ 4b and c

of the CEA, 7 U.S.C. §§ 6b and c. The District Court summarized these charges as follows (547 F. Supp. 310):

> "The Tamaris allege that Bache Lebanon solicited commodity futures orders (apparently for silver, coffee and pork bellies, among other commodities) from them in Lebanon and then transmitted such orders by wire from its Beirut office to Bache Delaware's Chicago offices for execution on the Chicago Board of Trade (the CBOT) and the Chicago Mercantile Exchange (the CME). They further allege that Bache Lebanon made misrepresentations regarding its expertise, gave false advice on market conditions, mismanaged their accounts, and breached its fiduciary duty."

Bache Lebanon was in effect a foreign soliciting arm for Bache Delaware. It is a wholly owned subsidiary of Bache Delaware which in turn executed the orders on the various commodity exchanges regulated under the CEA. As provided by Rule 322 of the New York Stock Exchange, of which Bache Delaware is a member and whose rules bind it, Bache Delaware guaranties the liabilities of Bache Lebanon, under this rule which provides in pertinent part:

> "*All* obligations or liabilities of a corporate subsidiary formed hereunder [including the incorporation of foreign branch offices of member organizations] shall be assumed or guaranteed by the member organization with which it is connected and such member organization shall be *fully responsible* for all acts of such subsidiary." (emphasis supplied)

The wrongful acts here were initiated by the Lebanese branch of a U.S. company and that U.S. company proceeded to carry those wrongful acts to their fruition on the floors of various trading exchanges located within the United States and regulated under the CEA.

THE WRIT SHOULD NOT BE GRANTED

This interlocutory order presents no extraordinary issue compelling a review by this Court at this intermediate stage of the litigation. The ruling presents nothing new and the result reached, far from being unusual, accords with every appellate decision passing upon the scope of subject matter jurisdiction of either the CEA or Securities Exchange Act of 1934 ("SEA").

Indeed, every appellate ruling based upon transactions executed on a U.S. exchange regulated under the CEA or SEA has found subject matter jurisdiction irrespective of the nationality of the trader or the place of origin of the trade.[1] Conversely, as noted by the District Court here, those decisions which found no subject matter jurisdiction, ". . . all involved foreign securities that were not traded on American exchanges: *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Investment Properties International, Ltd. v. IOS, Ltd.*, [1970-71] Fed. Sec. L. Rep. (CCH) ¶ 93,011 at 90,736 (S.D.N.Y.), *aff'd without opinion* (2d Cir. 1971); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 7 (2d Cir. 1979); *Finch v. Marathon Securities Corp.*, 316 F.Supp. 1345, 1347 (S.D.N.Y. 1970) ('It should be noted that [the securities involved] have never been registered in this country—nor have they ever been listed on any of our national securities exchanges or traded on our over-the-counter market.')" 547 F. Supp. at 313.

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1 *E.g. Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979). *IIT v. Cornfield*, 619 F.2d 909, 918-19 (2d Cir. 1980); *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3rd Cir. 1976); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 136 (9th Cir. 1977); *see also, Roth v. Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969) (fact that foreign defendant bought and sold securities on an American exchange, utilizing American broker-dealer, was sufficient to sustain application of United States law governing trading by corporate insiders).

Thus, this decision by the Seventh Circuit accords with the same result reached by the Second, Third, Eighth and Ninth Circuits. In addition, in the *Psimenos* case, which is indistinguishable in all material respects from this case, both the Commodities Futures Trading Commission (the "CFTC") and the SEC, the administrative agencies responsible for enforcing the CEA and SEA, respectively, submitted amicus briefs urging the result reached therein by the Second Circuit.[2] The expertise of administrative agencies in delineating the bounds of subject matter jurisdiction of the Act which Congress has charged it with enforcing is entitled to great weight.[3] Finally, it is not without significance that the brokerage house involved in the *Psimenos* case, E.F. Hutton & Co., did not consider the matter worthy of review by this Court and filed no petition for certiorari seeking review of that interlocutory order sustaining subject matter jurisdiction under the CEA with respect to a trade initiated by a foreign citizen out of the country.

The result reached by this remarkably unanimous line of authorities appears to be correct. Turning first to the "effects" test for international jurisdiction, the bald assertion in the amicus brief submitted by the Futures Industry Association and various commodity exchanges (the "FIA" brief), that "no

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2 The CFTC also submitted an amicus brief in this case to the Seventh Circuit urging affirmance of the result reached in the district court.

3 *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (agency determination that certain persons "aggrieved" and therefore within jurisdiction of governing statute "entitled to great weight"); *Escondido Mut. Water Co. v. Fed. Energy Regulatory Com.*, 692 F.2d 1223, 1230 (9th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 104 S. Ct. 2105 (1984) (agency determination of the "scope" of its governing statute entitled to "great deference"). *See Chemical Mfrs. Assoc. v. Environmental Protection Agency*, 673 F.2d 507 (D.C. Cir. 1982). This principle is in accord with the general rule that the construction of a statute by the agency charged with its execution is entitled to substantial deference. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), *Quern v. Mandley*, 436 U.S. 725 (1978), *later app.*, 635 F.2d. 659 (7th Cir. 1980). *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974).

impact on United States markets occurs if a foreign broker deceives a foreign customer" is wrong, factually and legally. Factually, this was not a foreign broker but rather an overseas trading arm of a U.S. company, whose liabilities have been guaranteed by its U.S. parent. Legally, we submit that the District Court reached the correct conclusion with respect to this "effects" test in holding:

> "As the court reads *Bersch* [*v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)] and other similar cases, the need for plaintiffs to demonstrate a particularized harm to domestic interests only arises when domestic investors or exchanges are not directly involved. Conversely, in a case such as this, where the challenged transactions involve trading on domestic exchanges, harm can be presumed, because the fraud alleged implicates the integrity of the American market." *Id.* at 313.

Similarly, the Second Circuit in *Psimenos* (722 F.2d 1046) held:

> ". . . Congress did not want the United States to be used as a base for manufacturing fraudulent securities devices, irrespective of the nationality of the victim, *Bersch*, *supra*, neither did it want United States commodities markets to be used as a base to consummate schemes concocted abroad, *particularly when the perpetrators are agents of American corporations.*" (emphasis added).

Indeed, this country, through its courts, has a particularly vital interest in sustaining the integrity of its trading markets dealing in commodities futures. These contracts are pervaded with a transnational character to a far greater extent than are most listed securities. Contrary to the implications contained in the petition of Bache and the brief of the FIA, one of the principal purposes of Congress in creating the CTFC was to protect United States' interests in interstate and foreign commerce in the trading of commodity futures. *See* S. Rep. No.

1131, 93d Cong., 2d Sess. 18-24 (1974); *Board of Trade of the City of Chicago v. Commodity Futures Trading Com.*, 605 F.2d 1016 at 1017-18 (7th Cir. 1979), *cert. denied* 446 U.S. 928 (1980). Its concern over foreign abuses of the commodity markets was evidenced during its deliberations in 1974. So marked was this concern over unregulated foreign trading in the United States markets that Senator Henry Bellmon questioned whether Congress should permit any foreign participation in domestic commodity markets. *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess., pt. 1 at 218 (1974). None of the legislative history indicates an intent to exclude foreigners from the definition of "any person" as used in § 4b of the CEA.

With respect to the "conduct" test for international jurisdiction, it is clear again that a case involving commodity futures presents even stronger reasons for sustaining subject matter jurisdiction than does the usual securities case where jurisdiction is routinely upheld. The nature of a U.S. commodities futures contract is such that the wrongful conduct by definition can only be consummated on the U.S. exchange. The Second Circuit in *Psimenos* emphasized this unique characteristic of a commodities futures contract, stating:

> "The commodity futures contracts involved are domestic: they are created by domestic exchanges and may lawfully be traded only on those exchanges. CFTC Brief at 7; see U.S.C. § 6a (1982); *In the Matter of Wiscope, S.A.* [1977-1980 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 20,785 at 23,199 (CFTC March 19, 1979), *vacated on other grounds sub nom. Wiscope S.A. v. Commodity Futures Trading Commission*, 604 F.2d 764 (2d Cir. 1979) (Whereas securities often 'can be moved from place to place, bought, sold, traded or borrowed outside a central market, a commodity futures contract has no lawful existence or being independent of the designated contract market upon which it is traded.')."

As noted by the District Court, *id.* at 1047, the execution of the orders on the floors of the various U.S. Exchanges was a necessary step in consummating the fraudulent scheme involved in this case.

Faced with this inescapable conclusion, the FIA is reduced to arguing in its amicus brief (p. 9), that a different result would have followed if Bache Lebanon had "bucketed" the orders rather than having them executed on these U.S. exchanges. It argues that by " 'bucketing its customers' orders, Bache Lebanon would have escaped the 'essential step' in any futures fraud and thereby avoid suit in the United States." What the FIA and the various commodity exchanges joining in its brief are in effect arguing is that overseas trading arms of U.S. commodity firms should be free to fleece foreigners on transactions involving actual trades of U.S. futures contracts; otherwise, according to the FIA, these firms will misrepresent to their customers by merely pretending to have the orders executed on U.S. exchanges.

In support of this argument the FIA relies on *Mormels v. Girofinance, S.A.*, 544 F.Supp. 815 (S.D.N.Y. 1982). In that case the foreign broker did, in fact, "bucket" the order. The critical distinction overlooked by the FIA is that the foreign broker in that case was holding itself out as a trading arm of a U.S. broker whereas in actual fact it was not. In this case, however, the misconduct was engaged in by what actually was the real foreign arm of a U.S. broker. As conceded by the FIA (p. 9), such "bucketing" would have explicitly violated § 4b(D) of the CEA, and if Bache Lebanon had engaged in such a practice involving a purported execution on a U.S. exchange, it would likewise have been liable.

CONCLUSION

The interlocutory order sought to be reviewed here reflects the standard application of well-recognized principles of international law necessary to sustain the integrity of transnational dealings consummated on the floors of the U.S. commodity exchanges regulated under the CEA. It represents nothing new, different or unfair and the petition should be denied.

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July 20, 1984

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David F. Dobbins

Sworn to before me this
20th day of July, 1984

_____

Notary Public

No. 83-1904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACHE & CO. (LEBANON) S.A.L.,
a Lebanese corporation,

Petitioner,

—against—

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI, co-partners d/b/a WAHBE TAMARI & SONS CO.,

Respondents.

PETITIONER'S REPLY IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents offer three arguments in opposition to Bache Lebanon's Petition, none of which can survive close scrutiny.

(1)

The Tamaris assert that federal courts have found subject matter jurisdiction in securities and commodities cases "irrespective of the nationality of the trader or the place of origin of the trade." (Respondents' Br. at 3) They claim that subject matter jurisdiction hinges solely upon whether the trades at issue involve American securities or commodities traded on

American exchanges. *Id.* Respondents cite *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) for the proposition that, since domestic commodity futures transactions can only take place on the commodities exchanges, fraud in connection with commodities trading necessarily is consummated in the United States. (Respondents' Br. at 6)

The Tamaris' contentions blur a critical distinction and misstate Bache Lebanon's position. First, there is an obvious distinction between the consummation of fraud and the consummation of a transaction, particularly when the propriety of the execution of the trade is not at issue. It is true that some of the Tamaris' trades were executed in the United States. But the alleged "fraud" was consummated in all respects outside of the United States. (Petition, App. B at A-7; App. C at A-16) The mere execution of trades on domestic exchanges did not constitute a material step in the consummation of the alleged fraud; the executions themselves are not the subject of any claim by the Tamaris and were adjudicated to be proper in an arbitration between the Tamaris and Bache Delaware under the auspices of the Chicago Board of Trade. (Petition at 3)

Moreover, Bache Lebanon does not rely solely on the facts that it is a Lebanese corporation, the Tamaris are Lebanese citizens and all of their orders originated in Lebanon. What is significant here is that every material act in the relationship of the parties occurred in Lebanon. It would make no difference, for example, if Bache Lebanon were a branch office, instead of a subsidiary, of Bache Delaware so that the Tamaris dealt directly with Bache Delaware. So long as the alleged fraud took place in Lebanon, there should be no federal jurisdiction simply because the mechanical act of executing the Tamaris' trades—in a proper and lawful manner—occurred in the United States. . . .

Thus, the cases relied upon by respondents are inapposite. (Respondent's Br. at 3)[1] In *Continental Grain (Australia) Pty.*

1 The Tamaris state that *Psimenos* is only the latest in this purportedly unanimous line of cases. (Respondents' Br. at 4) Those

Ltd. v. *Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), the defendants, vendors of stock in an Australian corporation, were respectively a California corporation and a California resident. Defendants hid from plaintiff—by means of letters and telephone calls originating in the United States—the fact that the primary asset of the Australian corporation would be removed from the corporation's possession upon completion of plaintiff's purchase. The defendants executed the contract for the sale of the corporation in California. The Court of Appeals reversed the District Court's dismissal for lack of subject matter jurisdiction noting that the District Court had found that "the failure to disclose . . . had been conceived in and directed from the United States." *Id.* at 412. Thus, in *Continental* the acts in the United States "constituted the organization and completion of the fraud." *Id.* at 420. In contrast, in this case all of the allegedly fraudulent acts occurred in Lebanon and the activities that took place in the United States are not the subject of any of the Tamaris' claims.

In *IIT* v. *Cornfeld*, 619 F.2d 909 (2d Cir. 1980), plaintiff, an investment fund with over 200 investors resident in the United States, alleged fraud in connection with the purchase, in part through an American brokerage firm, of stock in a publicly held Maine corporation and a privately held Colorado corporation. The defendants included the American brokerage firm, an accounting firm that had prepared the prospectus from its Denver office, and the Americans who controlled the notorious Investors Overseas Services, Ltd. The Court found that the fraud had originated in the United States, *id.* at 918, and stated that "[d]etermination whether American activities 'directly' caused losses to foreigners depends not only on how much was

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cases, as we demonstrate below, are readily distinguished from this case and the purported unanimity only underscores the need for a ruling by this Court before the federal courts are inundated by predominantly foreign lawsuits. The Tamaris also grope for significance in the manifestly irrelevant fact that the brokerage firm involved in *Psimenos* did not petition this Court for a writ of certiorari. (Respondents' Br. at 4)

done in the United States but also on how much . . . was done abroad." *Id.* at 920-21. *IIT* does not support a finding of subject matter jurisdiction in a case in which the only contact with the United States is the execution of trades on a domestic exchange.

In *Straub* v. *Vaisman & Co.*, 540 F.2d 591 (3rd Cir. 1976), plaintiffs purchased stock in an American corporation on the basis of recommendations by an American broker who knew that the corporation was about to become bankrupt. The court found that "[t]he fraudulent scheme was conceived in the United States by American citizens, involved stock in an American corporation traded on [an] American over-the-counter exchange, and an American securities broker from his office in New Jersey was responsible for the wrongful omissions." *Id.* at 595. In *Straub*, unlike this case, the mere execution of plaintiff's trades on a domestic exchange was only one of several other contacts with the United States which were far more substantial in nature.

Des Brisay v. *Goldfield Corp.*, 549 F. 2d 133 (9th Cir. 1977), involved a fraudulent transaction between a Canadian and American corporation which "resulted in the collapse of the American market in Goldfield shares." *Id.* at 136. The Court of Appeals held that the District Court had erred in dismissing the complaint for lack of subject matter jurisdiction because the complaint, construed most favorably for the plaintiff, *id.* at 135 n.3, alleged particularized impact on the American market. Here, the Court of Appeals only speculated about presumed generalized impact (Petition at 7; App. B at A-10, A-12).[2] The *Des Brisay* Court "emphasize[d] that [its] conclusion that subject matter jurisdiction exists in this case is provisional" and remanded to the District Court for further proceedings. *Id.* at 136. The complaint was later dismissed as

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2 The *Des Brisay* Court distinguished *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) on this ground, noting that in *Bersch* only a generalized harm to investors' confidence in the market was alleged. *Des Brisay*, 549 F.2d at 136 n.4. In *Des Brisay*, the injury to other investors in the United States was particularized and definite.

time barred. *Des Brisay* v. *Goldfield Corp.*, 637 F.2d 680 (9th Cir. 1981).

(2)

Respondents suggest that because Bache Delaware owns Bache Lebanon and purportedly must guarantee its obligations pursuant to the rules of the New York Stock Exchange, the District Court has jurisdiction over the subject matter of the Tamaris' claims. Thus, the Tamaris advance the remarkable proposition, without citation, that mere corporate affiliation with an American company is sufficient to confer subject matter jurisdiction on the federal courts. This expansive view of subject matter jurisdiction is not supported by any authority. *See Fidenas AG* v. *Honeywell Inc.*, 501 F. Supp. 1029 (S.D.N.Y. 1980) (earlier determination that court lacked subject matter jurisdiction over claims against foreign subsidiary did not change when plaintiffs sued subsidiary's American parent).

The Tamaris choose to ignore the fact that every material act in this case—including the alleged fraudulent acts—took place in Lebanon. That Bache Lebanon is owned by Bache Delaware does not alter the overwhelmingly foreign locus of this case. The Tamaris do not allege fraud in connection with the ministerial act of executing their orders on United States exchanges and, in fact, all of the Tamaris' claims against Bache Delaware—the only entity that acted in the United States with respect to their accounts—were dismissed by an arbitration panel of the Chicago Board of Trade.

(3)

Finally, the Tamaris urge this Court to defer to the Commodity Futures Trading Commission, which has filed *amicus* briefs in support of the exercise of subject matter jurisdiction in both *Psimenos* and *Tamari*. (Respondents' Br. at 4) Judicial deference is inappropriate in this case. Recently, the Court of Appeals for the District of Columbia held that "judicial deference to an agency's interpretation of its investigative authority is not justified when the agency's action may have

extraterritorial impact." *In The Matter Of An Application To Enforce An Administrative Subpoena Of The Commodity Futures Trading Commission* v. *Nahas*, No. 83-2313 (D.C. Cir. July 6, 1984) (attached as Appendix, 15a n.17). An agency's interpretation of the extraterritorial reach of its statute in cases involving private litigants is not entitled to any greater deference.[3]

CONCLUSION

For the foregoing reasons, Bache Lebanon's Petition should be granted.

August 15, 1984

Respectfully submitted,

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3 In *Nahas*, the Court of Appeals held that the District Court lacked jurisdiction under Section 6(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 15, to enforce an investigative subpoena served on a foreign citizen in a foreign nation regarding commodities trades on United States exchanges. Although the Court noted that *Psimenos* and *Tamari* arose under different sections of the CEA, *Nahas*, Appendix at 7a n.7, the *Nahas* Court's analysis of the appropriate limits on extraterritorial enforcement of American laws is inconsistent with the decisions below and in *Psimenos*.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2313

IN THE MATTER OF AN APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA OF THE COMMODITY FUTURES TRADING COMMISSION

—v.—

NAJI ROBERT NAHAS,

Appellant

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. Misc. 83-00256)

Argued March 12, 1984

Decided July 6, 1984

Thomas W. Kelly, with whom *Lawrence Z. Lorber, James D. Zirin*, and *Noah Nunberg* were on the brief, for appellant.

Howard Lowell Brown, Attorney, Commodity Futures Trading Commission, with whom *Kenneth M. Raisler*, General Counsel, Commodity Futures Trading Commission, was on the brief, for appellee.

Before WRIGHT, TAMM, and STARR, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This appeal concerns a federal district court's jurisdiction under 7 U.S.C. § 15 (1982) to enforce an investigative subpoena served by the Commodity Futures Trading Commission (Commission) on a foreign citizen in a foreign nation. Naji Robert Nahas, a citizen and resident of Brazil, was served in Brazil with a subpoena *duces tecum* issued by the Commission. The subpoena required Nahas to appear and produce documents at the Commission's offices in Washington, D.C. Nahas did not comply with the subpoena, nor did he comply when the district court, exercising jurisdiction pursuant to 7 U.S.C. § 15, enforced the subpoena. The district court then froze *pendente lite* Nahas' assets in the United States and, after a full hearing, found Nahas in contempt for his failure to comply with the enforcement order. On appeal, Nahas contends that the enforcement order is void and that he should not be held in contempt for noncompliance with a void enforcement order.

Because we find that the district court lacks jurisdiction under 7 U.S.C. § 15 to enforce an investigative subpoena served on a foreign citizen in a foreign nation, the court's enforcement order, freeze order, and contempt order are void. Accordingly, we vacate all three orders.

I. BACKGROUND

A. *The Commission's Investigative Subpoena*

In March 1980, the Commission began investigating whether certain individuals had violated the Commodity Exchange Act (Act), 7 U.S.C. §§ 9, 13(b), 13b (1982), by manipulating the price of silver and silver futures contracts in 1979 and 1980. In the course of its investigation, the Commission discovered that Naji Robert Nahas, a Brazilian citizen and resident, had opened accounts in 1979 with several brokerage houses in the United States. Through these accounts, Nahas had purchased numerous silver futures contracts and approximately ten mil-

lion ounces of silver bullion. Joint Appendix (J.A.) at 19, 183. Nahas also may have controlled accounts containing large quantities of silver maintained in the names of other individuals and entities. J.A. at 19-20, 103.

On May 6, 1983, the Commission issued a subpoena *duces tecum* pursuant to its investigative power under 7 U.S.C. § 15. The subpoena, served by substituted service in Sao Paulo, Brazil, directed Nahas to appear on July 12, 1983 at the Commission's offices in Washington, D.C. and to produce certain documents.[1] When Nahas failed to comply with the Commission's subpoena, the Commission petitioned the district court for an order directing Nahas to show cause why he should be relieved of compliance. J.A. at 10-11. The show cause order was issued on August 23, 1983 and served on Nahas in Sao Paulo. *CFTC v. Nahas*, No. 83-0256 (Order to Show Cause) (D.D.C. Aug. 23, 1983), J.A. at 8-9.

Nahas ignored the show cause order, prompting the court to issue an enforcement order directing Nahas to comply with the Commission's subpoena by October 6, 1983. *CFTC v. Nahas*, No. 83-0256 (Enforcement Order) (D.D.C. Sept. 14, 1983), J.A. at 94.[2] Nahas failed to respond to the enforcement order.

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1 Prior to issuing the subpoena, the Commission consulted the United States Department of State concerning the proper method for serving an administrative subpoena on a Brazilian citizen in Brazil. The State Department advised that Brazilian law did not prohibit the service of an administrative subpoena by a Brazilian attorney upon a Brazilian citizen in Brazil. The State Department also provided the Commission with a list of Brazilian attorneys in Sao Paulo, where Nahas worked and resided, who could act as agents for the Commission in serving a subpoena. The Commission selected a Brazilian attorney from the list to serve the subpoena. Joint Appendix (J.A.) at 114-15, 145-46. The attorney delivered copies of the subpoena on June 14, 1983 to Nahas' office receptionist and to the doormen of Nahas' apartment building. J.A. at 40-41.

2 The enforcement order was served on Nahas in Sao Paulo on September 28, 1983. J.A. at 116-17.

Upon the Commission's motion, the district court issued orders freezing *pendente lite* Nahas' assets in the United States[3] and directing Nahas to show cause why he should not be held in civil contempt. *CFTC v. Nahas*, No. 83-0256 (D.D.C. Oct. 11, 1983) (Order to Show Cause), J.A. at 142-43, (Order Freezing Assets), J.A. at 134-35.

B. *The Contempt Proceeding*

On November 14, 1983, Nahas formally responded for the first time in this proceeding. He filed a cross-motion to quash the Commission's subpoena, vacate the freeze order, deny the Commission's motion for contempt, and dismiss the proceedings in their entirety. J.A. at 162-63. Nahas contended that the Commission had exceeded its statutory authority in issuing an investigative subpoena to a foreign citizen in a foreign nation, and that the Commission's method of serving the subpoena was illegal.[4] J.A. at 189-94. In support of his contentions, Nahas submitted an affidavit prepared by Professor Irineu Strenger, a Brazilian attorney and a professor of law at the University of Sao Paulo, stating that the service of the Commission's subpoena violated Brazilian and international law. J.A. at 174-80. Nahas also submitted a document signed by thirty-five members of the Congress of Brazil protesting the administrative and judicial proceedings taken against Nahas as violative of Brazilian and international law. J.A. at 167-71.[5]

The district court rejected Nahas' arguments:

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3 Nahas' assets in the United States consist of art valued at approximately 12 million dollars. J.A. at 187.

4 Nahas accompanied his cross-motion with an affidavit in which he averred he was a citizen of Brazil, had resided in Brazil since 1969, had never been a resident or citizen of the United States, had not conducted any business in the United States since May 6, 1983, and had not been personally served with the Commission's subpoena. J.A. at 166.

5 On March 2, 1984, the Brazilian Ministry of Foreign Affairs sent a letter to the United States Secretary of State protesting the

> It is well established that a civil contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed. An order by a court with jurisdiction over the subject matter and the parties must be obeyed until reversed by orderly and proper proceedings. . . . It is clear, therefore, that if the September 14 [Enforcement] Order . . . may be challenged at all in this contempt action, it may be challenged only on the grounds that the court lacked the power or jurisdiction to issue the order.

CFTC v. Nahas, No. 83-0256 at 5-6 (D.D.C. Dec. 16, 1983), J.A. at 220, 224-25 (citations omitted). The court found subject-matter jurisdiction under 7 U.S.C. § 15. *Id.* at 6-7, J.A. at 225-26. The court also found that Nahas' substantial participation in the futures markets of the United States constituted sufficient contacts for the court to exercise personal jurisdiction. *Id.* at 7-8, J.A. at 226-27. Concluding that it had competent jurisdiction to issue the enforcement order, the court held Nahas in contempt for disobeying the order without good cause.[6] *Id.* at 8, J.A. at 227.

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method the United States had used to serve Nahas. The letter indicated that the United States improperly had circumvented Brazilian authorities, and it exhorted the United States to ensure future compliance with Brazilian law regarding the delivery of process communicating acts at the international level. *See* Letter from Brazilian Ministry of Foreign Affairs to United States Embassy (Mar. 2, 1984), Reply of Appellee to Appellant's Supplement of the Record, Exhibit 2. *See also* Letter from Brazilian Ministry of Foreign Affairs to Brazilian Ministry of Justice (Mar. 2, 1984), Appellant's Supplement of the Record.

6 To compel Nahas' compliance with the enforcement order, the court imposed a fine of $5,000 for each day after December 28, 1983 that Nahas failed to comply with the Commission's subpoena. If Nahas did not comply by January 6, 1984, the daily fine would increase to $10,000 and a bench warrant for Nahas' arrest would issue. Nahas also was ordered to reimburse the Commission for attorneys' fees and for costs incurred in the contempt proceeding. To

On appeal, Nahas challenges the district court's contempt and freeze orders on the ground that the enforcement order is void. Because we find that the district court lacked subject-matter jurisdiction under 7 U.S.C. § 15 to enforce an investigative subpoena served upon a foreign citizen in a foreign country, we agree that the enforcement order, freeze order, and contempt order are void.

II. ANALYSIS

A.

The Commission argues at the outset that Nahas may not challenge at the contempt proceeding the jurisdiction of the district court to issue the enforcement order. Because Nahas failed to pursue a timely appeal of the enforcement order, the Commission contends that the doctrine of *res judicata* bars Nahas from reopening an issue that could have been litigated during the enforcement proceeding. We disagree.

The Commission's argument fails to acknowledge that the enforcement order against Nahas was entered by default. "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). Because the instant enforcement proceeding resulted in a default order, Nahas was not barred by *res judicata* from challenging the court's enforcement jurisdiction at the contempt proceeding.[7] *See Insur-*

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perserve a fund from which any fines could be satisfied, the court extended the freeze on Nahas' assets in the United States until Nahas purged himself of contempt. CFTC v. Nahas, No. 83-0256 at 9-10 (D.D.C. Dec. 16, 1983), J.A. at 228-29.

7 Nahas' jurisdictional challenge at the contempt proceeding was also permissible under Rule 60(b) of the Federal Rules of Civil Procedure, which states in pertinent part:

ance Corp. of Ireland, 456 U.S. at 706; *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *Heasley v. United States*, 312 F.2d 641, 648-49 (8th Cir. 1963); Restatement (Second) of Judgments § 65 (1982).

B.

Nahas challenges the subject-matter jurisdiction of the district court to enforce the Commission's subpoena under 7 U.S.C. § 15. He contends that 7 U.S.C. § 15 does not empower a district court to enforce an administrative subpoena served on a foreign citizen in a foreign country. He claims the court therefore erred at the contempt proceeding in finding him in contempt and in imposing civil sanctions to compel his compliance.[8] We agree.

> On motion and upon such terms as are just, the court may relieve a party. . .from a final judgment, order, or proceeding for the following reasons:. . .(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated. . . .

FED. R. CIV. P. 60(b). Under subsection 4 of Rule 60(b), a court may examine in a contempt proceeding whether the underlying enforcement order is void: if it is, relief from the enforcement order should be granted. Under subsection 5, if the underlying enforcement order is void, the contempt order must also be void. *See* V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 & n.8 (10th Cir. 1979); Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962).

8 7 U.S.C. § 15 (1982) was the sole jurisdictional basis of the district court's enforcement order. *See* J.A. at 11, 94, 183-84, 225-26. Our analysis of whether the court exceeded its jurisdictional authority is therefore limited to this statute.

The Second Circuit's decision in Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983), is inapposite because it dealt with a private cause of action under the anti-fraud provisions of the Commodity Exchange Act. The Seventh Circuit's decision in Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469 (7th Cir. 1984), is similarly inapposite. For a discussion of the distinction between the

It is a principle of first importance that a federal court possesses only limited jurisdiction.[9] *Insurance Corp. of Ireland*, 456 U.S. at 701. A federal court's subject-matter jurisdiction, constitutionally limited by article III, extends only so far as Congress provides by statute. *Id.* at 701-02; 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3522, at 44 (1975). When a federal court reaches beyond its statutory grant of subject-matter jurisdiction, its judgment is void.[10] Similarly, when an enforcement order entered by default is beyond the jurisdictional grant of the issuing court, the order is void. *See United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963). *See generally EEOC v. Shell Oil Co.*, 52 U.S.L.W. 4399, 4402 (U.S. Apr. 2, 1984) (federal courts must

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service of notice that occurred in both *Psimenos* and *Tamari* and the service of compulsory process that occurred here, and of the consequences that flow from this distinction when other nations are involved, see *infra* note 14 and accompanying text.

9 A federal court presumptively lacks jurisdiction in a proceeding until a party demonstrates that jurisdiction exists. A party must therefore affirmatively allege in his pleadings the facts showing the existence of jurisdiction, and the court must scrupulously observe the precise jurisdictional limits prescribed by Congress. *See* Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884); FED. R. CIV. P. 8(a)(1), 12(h)(3); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 44-45 (1975).

10 In Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920), the Supreme Court stated:

> Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal.

Id. at 353-54. *See also* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); United States v. Walker, 109 U.S. 258, 266-67 (1883); RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 11 (1982).

observe congressional limits on agency investigative powers in enforcement of agency subpoenas).

In the instant case, the jurisdiction of the district court to enforce Commission subpoenas arises from 7 U.S.C. § 15:

> For the purpose of securing effective enforcement . . . and for the purpose of any investigation or proceeding . . ., any member of the Commission . . . may . . . subpena [sic] witnesses . . . and require the production of any . . . records that the Commission deems relevant . . . . *The attendance of witnesses and the production of any such records may be required from any place in the United States or any State* at any designated place of hearing. In case of . . . refusal to obey a subpena [sic] . . ., the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted . . . . *Such court may issue an order requiring such person to appear before the Commission* . . . to produce records . . . or to give testimony. . . . Any failure to obey such order of the court may be punished by the court as a contempt thereof.

7 U.S.C. § 15 (emphasis added). The district court thus has jurisdiction to enforce only those subpoenas issued to "such person[s]" as defined in section 15. The plain language of the statute limits "such person[s]" to "witnesses. . .from any place in the United States or any State. . . ." *Id.*

Although courts, in some instances, have construed similar language as authorizing enforcement of administrative subpoenas requiring the production of records from outside the United States, those subpoenas were served on individuals within the United States.[11] No court has expressly considered

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11 For example, in SEC v. Minas de Artemisa, 150 F.2d 215 (9th Cir. 1945) (construing section 19(b) of the Securities Act of 1933, 15 U.S.C. § 77s(b)), the Ninth Circuit enforced an investigative subpoena that required a Mexican corporation, which was owned and controlled by a United States corporation and which did business in the United States, to produce records located in Mexico. The sub-

whether Congress intended 7 U.S.C. § 15 to authorize judicial enforcement of an investigative subpoena served upon a foreign citizen in a foreign nation. Although the plain language of the statute does not confer such power, the district court in this case nevertheless inferred jurisdiction. Because this inference is not supported by legislative history or analogous precedent, we believe that sound rules of statutory construction compel a different conclusion.

An important canon of statutory construction teaches that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952); *United States v. Mitchell*, 553 F.2d 996, 1001-03 (5th Cir. 1977). The text of 7 U.S.C. § 15 does not empower the Commission to serve subpoenas on foreign nationals in foreign countries. Similarly, the legislative history does not indicate that Congress intended to clothe the Commission with the power to serve investigative subpoenas extraterritorially. We are not prepared, in the face of a silent statute and an uninstructive legislative history, to infer the existence of this power:

> The service of an investigative subpoena on a foreign national in a foreign country . . . [is] a sufficiently

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poena was *served within the United States upon a United States citizen* who was president of the Mexican corporation. *Id.* at 217. Similarly, in FMC v. DeSmedt, 366 F.2d 464 (2d Cir.) (construing section 27 of the Shipping Act of 1916, 46 U.S.C. § 826(a)), *cert. denied*, 385 U.S. 974 (1966), the Second Circuit enforced investigative subpoenas that required the production of documents located outside the United States in the possession of carriers who engaged in commerce in the United States. The subpoenas were *served within the United States upon United States residents* who were agents of the carriers. 366 F.2d at 471. These cases indicate that the Commission would, under similar circumstances, have authority to require production of documents held abroad. *See* CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 953 (D.C. Cir. 1979).

significant act as to require that Congress should speak to it clearly.

FTC V. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1327 (D.C. Cir. 1980) (McGowan, J., concurring).[12]

We are influenced as well by another canon of statutory construction that requires courts, wherever possible, to construe federal statutes to ensure their application will not violate international law.[13] *Murray v. The Schooner Charming Betsy*,

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12 The Commission asserts that the court may infer from the language of section 15 that Congress intended the Commission to have power to serve its subpoenas extraterritorially. The statute authorizes the Commission to subpoena witnesses and records from "any place in the United States *or any State*. . . ." 7 U.S.C. § 15 (emphasis added). In support of its assertion, the Commission invites our attention to 7 U.S.C. § 3, which discusses transactions in interstate commerce and defines "State" as including foreign nations.

The Commission ignores, however, that 7 U.S.C. § 3 explicitly limits its definition of "State" to that section. We could as well be influenced by section 13a-2, which discusses the jurisdiction of states and defines "State" as "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States." 7 U.S.C. § 13a-2(6).

Nevertheless, absent clear evidence of legislative intent, we are unwilling to extend to 7 U.S.C. § 15 definitions intended exclusively for other sections. Instead, we are guided by established rules of statutory construction, and we presume that had Congress intended to authorize the Commission to serve subpoenas on foreign citizens in foreign nations, it would unambiguously have expressed that intent.

13 The Constitution commits to the Legislative and Executive Branches, not to the Judicial Branch, the conduct of foreign relations. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). Our rules of statutory construction in the instant case embody concerns for preserving the relationships between the branches of government in a system of separation of powers. Hence, we hesitate to infer from 7 U.S.C. § 15, absent clear congressional intent, enforcement jurisdiction that arouses foreign sensibilities and implicates international law concerns.

U.S. (2 Cranch) 64, 118 (1804); *Saint-Gobain*, 636 F.2d at 1323 & n.130. To construe 7 U.S.C. § 15 as empowering the district court to enforce an investigative subpoena served on a foreign citizen in a foreign nation would seriously impinge on principles of international law. "When compulsory process is served [on a foreign citizen on foreign soil in the form of an investigative subpoena[14]], . . the act of service *itself* constitutes an exercise of one nation's sovereignty within the territory of another sovereign. Such an exercise [absent consent by the foreign nation] constitutes a violation of international law." *Id.* at 1313 (footnote omitted). *See also id.* at 1313-14, 1317; Restatement (Second) of the Foreign Relations Law of the United States §§ 7, 8, 32 & comment b, 44 (1965).

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14 The distinction between service of compulsory process and service of notice is critical under principles of international law due to the difference in judicial enforcement power that accompanies each. When process in the form of a complaint is served extraterritorially, the informational nature of the process renders the act of service relatively benign in term of infringement on the foreign nation's sovereignty. FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1313 (D.C. Cir. 1980). *See supra* note 8. For example, when an agency serves a formal complaint on a foreign citizen in a foreign nation, the recipient simply receives information upon which he may decide whether to negotiate a consent order or proceed to litigation. The result of the litigation may always be appealed before a cease-and-desist order will issue. Not until the cease-and-desist order becomes final can the enforcement power of the courts be invoked.

By contrast, when an agency serves compulsory process in the form of an investigative subpoena, it compels the recipient to act. Should the recipient refuse to comply with the subpoena, the enforcement power of the federal courts can be invoked immediately. *See Saint-Gobain*, 636 F.2d at 1311-13. In the instant case, service of the Commission's subpoena on Nahas in Brazil constituted an act of American sovereignty within Brazil, because the subpoena carried with it the full array of American judicial power. *See id.* at 1312, 1313 & n.67. Such an intrusion on the sovereignty of another nation impinges on principles of international law and should be avoided unless expressly mandated by Congress.

The extent of the intrusion of Brazil's sovereignty in this case is reflected in a letter of protest sent by the Brazilian government to the United States Secretary of State. Brazilian law requires that service of process by foreign nations be made pursuant to a letter rogatory or a letter of request transmitted through diplomatic channels. *See* Reply of Appellee to Appellant's Supplement of the Record, Exhibit 3. In its letter of protest, Brazil remonstrated that the Commission's method of serving the subpoena "[did] not conform to the [Brazilian laws] governing the handling of . . . material [at the international level] . . . ."[15] Letter from Brazilian Ministry of For-

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15 Not only did the Commission fail to observe Brazilian law when serving the subpoena, it ignored guidance by this court in *Saint-Gobain* concerning methods of extraterritorial service that would minimize intrusion on another nation's sovereignty:

> [W]henever possible, an agency attempting subpoena service on foreign citizens residing on foreign soil should make initial resort through established diplomatic channels or procedures authorized by international convention.

636 F.2d at 1323. In *Saint-Gobain*, this court discussed the significant international implications of an agency bypassing foreign authorities when serving an investigative subpoena abroad:

> Given the compulsory nature of a subpoena, . . . *subpoena service by direct mail upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance, is perhaps maximally intrusive.* Not only does it represent a deliberate bypassing of the official authorities of the local state, it allows the full range of judicial sanctions for noncompliance with an agency subpoena to be triggered merely by a foreign citizen's unwillingness to comply with directives contained in an ordinary registered letter.

Id. at 1313-14 (footnotes omitted) (emphasis added). In the instant case, notwithstanding the Commission's inquiries to the State Department regarding how to serve the subpoena on Nahas, *see supra* note 1, the Commission's circumvention of Brazilian authorities appears to have been at least as intrusive and offensive to Brazilian sovereignty as was the agency's action in *Saint-Gobain*.

eign Affairs to United States Embassy (Mar. 2, 1984), Reply of Appellee to Appellant's Supplement of the Record, Exhibit 2. Brazil therefore admonished the United States to "ensure compliance, in future cases, with the formalities prescribed by Brazilian law for the execution of legal instruments required by foreign courts." *Id. See supra* note 5.[16] In light of this apparently significant intrusion on Brazilian sovereignty, inferring enforcement jurisdiction under 7 U.S.C. § 15 would seriously impact on principles of international law. Because "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118, we are unwilling to infer enforcement jurisdiction absent a clearer indication of congressional intent.

We emphasize that this case does not pose a question about the authority of Congress; rather, it poses a question about the congressional intent embodied in 7 U.S.C. § 15. Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law. *Saint-Gobain*, 636 F.2d at 1323. A clear congressional mandate authorizing the Commission to serve investigative subpoenas on foreign citizens in foreign nations is lacking in 7 U.S.C. § 15, and inferring such a mandate would run contrary to established canons of statu-

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16 The intrusion on Brazil's sovereignty is also indicated by a letter from 35 members of the Brazilian Chamber of Deputies, a House in Brazil's bicameral legislature, to the United States Ambassador in Brazil protesting:

> [t]he proceedings against a citizen not subject to territorial competence (jus loci) of American Justice . . . . [The proceedings] affect personal and family honor of persons foreign to the Sovereignty and Competence of the Government of the United States. . . . We are certain that Your Excellency, due to the international and national importance which the fact represents, will transmit to the honorable authorities of your Country this manifestation and protest.

J.A. at 170-71.

tory construction. In short, construing enforcement jurisdiction in the instant case would be, we believe, tantamount to enacting, rather than explicating, a law.[17]

C.

Finally, our conclusion that Congress did not intend in 7 U.S.C. § 15 to empower federal courts to enforce investigative subpoenas served on foreign citizens in foreign nations comports with analogous cases in which courts have construed similar language. For example, in *SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945), the agency was statutorily authorized to subpoena witnesses and documents "from any place in the United States or any Territory . . . ." *Id.* at 218. The Ninth Circuit construed the agency's authority broadly to require the production of documents outside the United States, *provided only that the service of the subpoena is made within the territorial limits of the United States.*" *Id.* (emphasis added). In *Ludlow Corp. v. DeSmedt*, 249 F.Supp. 496 (S.D.N.Y.), *aff'd sub nom. FMC v. DeSmedt*, 366 F.2d 464 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966), the agency was authorized to subpoena documents "from any place in the United States . . . ." 249 F.Supp. at 498 n.2. The court there also construed broadly the agency's power to require the production of documents located outside the country, but it was

17 The Commission correctly asserts that agencies generally are granted broad deference in determining the scope of their investigative authority. CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979). Because the Commission has construed its jurisdiction under the Act as extending to all market participants regardless of nationality or location, it contends that any ambiguity in 7 U.S.C. § 15 should be resolved in favor of promoting its investigative and regulative powers. The Commission fails to recognize, however, that judicial deference to an agency's interpretation of its investigative authority is not justified when the agency's action may have extraterritorial impact. *Saint-Gobain*, 636 F.2d at 1322. In light of the actual extraterritorial impact here and the absence of evidence indicating Congress intended to confer enforcement jurisdiction, we reject the Commission's argument and suggest that the argument more properly is dircted to Congress. *See supra* note 13.

careful to acknowledge "*that the service of the subpoena [was] made within the territorial limits of the United States . . . .*" *Id.* at 500 (emphasis added); *see id.* at 501. Finally, in *SEC v. Zanganeh*, 470 F.Supp. 1307 (D.D.C. 1978), the agency was authorized to subpoena witnesses "from any place in the United States or any State . . . ." *Id.* The court stated that where no individual service occurred and respondent was not in the United States, "*the [agency] has no power to subpoena an alien nonresident to appear before it from a foreign land.*" *Id.* (emphasis added).

Our construction of 7 U.S.C. § 15 is further strengthened by the existence of statutes in which Congress explicitly has authorized the extraterritorial service of investigative subpoenas on aliens. For example, Congress has authorized the Department of Justice in its antitrust investigations to serve civil investigative demands on foreign nationals "in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country."[18] 15 U.S.C. § 1312(d) (2) (1982). Congress also has empowered the Federal Trade Commission to serve its subpoenas on foreign nationals "in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation." *Id.* § 57b-1(c) (6) (B). The existence of these statutes "indicates that when Congress intends to authorize extraterritorial service of investigative subpoenas, it will express that intent explicitly." *Saint-Gobain*, 636 F.2d at 1325 n.140. An explicit grant of power is conspicuously absent from 7 U.S.C. § 15. Sound rules of statutory construction as well as analogous precedent therefore compel a construction of 7 U.S.C. § 15 that does not authorize enforcement jurisdiction in the instant case.[19]

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18 Federal Rule 4(i)(l) provides five alternative methods for service upon a party in a foreign country: in the manner prescribed by the law of the foreign country; as directed by the foreign authority responding to a letter rogatory; by personal service; by any form of mail requiring a signed receipt; or as directed by order of the court where the action is brought. Fed.R.Civ.P.4(i)(l).

19 This court in *Saint-Gobain* resolved a narrow issue involving the *technique* employed by an agency to serve its investigative

CONCLUSION

For the foregoing reasons, we find that the district court lacked jurisdiction under 7 U.S.C. § 15 to enforce the investigative subpoena served on Nahas in Brazil. The enforcement order, freeze order, and contempt order are therefore void. Accordingly, all three orders are vacated.

It is so ordered.

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subpoena abroad pursuant to a statute similar to 7 U.S.C. § 15. Specifically, the court found that the Federal Trade Commission could not serve its subpoena on a foreign citizen on foreign soil by registered mail under 15 U.S.C. § 49 (1976). 636 F.2d at 1306. Although it was unnecessary in *Saint-Gobain* to decide whether the statute conferred enforcement jurisdiction for investigative subpoenas served abroad on foreign citizens, the court's opinion seemed to assume the existence of such jurisdiction. We expressly address this jurisdictional issue today, and we hold that 7 U.S.C. § 15 does not confer enforcement jurisdiction for an investigative subpoena served on a foreign citizen in a foreign nation. This holding has been considered and approved by the full court, and thus constitutes the law of the circuit. *See* Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).